Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROSETTE, INC., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether patents issued pursuant to the 1916 Stock Raising Homestead Act conveyed heat appurtenant to groundwater in which Petitioner Rosette, Inc. has a recognized state property interest for use in irrigation and related greenhouse purposes, in the production of roses for commerce, when the heat is used to supplement greenhouse heating in winter months, and no heat is severed from the water for sale as a separate energy source, or is otherwise transferred for use off of Rosette's surface estate.

STATEMENT PURSUANT TO RULE 29.6

Rosette, Inc. and its affiliate corporations, Burgett Investment, Incorporated and Burgett Geothermal Greenhouse, Incorporated are all closely owned corporations owned or controlled by Dale Burgett and related family members.

There is no publicly held company which owns 10% or more of any of the Plaintiff's corporations' stock.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Authorities	v
Petition for Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reasons For Granting The Writ	7
I. This proceeding involves the important question of the scope of a patentee's estate under the 1916 Stock Raising Homestead Act, which should be settled by this Court	7
II. The Tenth Circuit's ruling in this proceeding is contrary to this Court's ruling in *Amoco Production Co. v. Southern Ute Indian Tribe, et al.*, 526 U.S. 865 (1999)	8
A. The Tenth Circuit's decision allows the meaning of "minerals" in the 1916 SRHA to fluctuate in perpetuity	8
B. Congress, in 1916, did not intend to reserve the heat Rosette uses, in the 1916 SRHA minerals reservation	11
1. In 1916, steam and hot water were not considered minerals reserved in the SRHA patent minerals reservation	11

TABLE OF CONTENTS – Continued

Page

2. The hot water used by Rosette furthers development of the surface estate, unlike the Geysers in *Union Oil*..... 13

a. The Geyser's highly toxic, highly mineralized water is fit only for the production of energy for sale off site 13

b. The characteristics of the hot water used by Rosette is different from the characteristics of the Geysers..... 16

C. Congress did not intend all associated geothermal resources referenced in the Steam Act to be subject to the 1916 SRHA minerals reservation..... 17

III. The Tenth Circuit's decision is contrary to the common interpretation of "minerals" within 42 U.S.C. § 299 because Rosette does not remove or sever the heat..... 19

IV. The Tenth Circuit's decision impairs Rosette's valid existing rights under the SRHA and New Mexico water law 21

A. Vested State Water Rights are Protected from Federal Encroachment..... 21

B. Valid existing rights under the SRHA protect Rosette's use of the heat in the water 22

Conclusion..... 26

TABLE OF AUTHORITIES

Page

CASES:

Amoco Production Co. v. Southern Ute Indian Tribe, et al., 526 U.S. 865 (1999) 8, 9, 12

Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604 (1978) 12, 18

Broder v. Natoma Water and Mining Co., 101 U.S. 274 (1879) 12, 23

California v. United States, 438 U.S. 645 (1978) 21

California Oregon Power Company v. Beaver Portland Cement, 295 U.S. 142 (1935) 23

Geothermal Kinetics, Inc. v. Union Oil Company of California, 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (App. 1 Dist. 1977) 16

Getty Oil v. Andrus, 607 F.2d 253 (9th Cir. 1979) 24

Haight v. Costanich, 194 P. 26 (Cal. 1920) 21

Hunter v. United States, 388 F.2d 148 (9th Cir. 1967) 21

Lindsey v. McClure, 136 F.2d 65 (10th Cir. 1943) 25

Occidental Geothermal, Inc. v. Simmons, 543 F. Supp. 870 (N.D. Cal. 1987) 19

Ricks Exploration Company v. Oklahoma Water Resource Bd., 695 P.2d 498 (Okla. 1984) 21, 22

Robinson v. Robins Petroleum Corp., Inc., 501 SW.2d 865 (Tex. 1973) 22

Rocky Mountain Oil and Gas v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), *reversed on other grounds*, 696 F.2d 734 (10th Cir. 1981) 24

TABLE OF AUTHORITIES – Continued

Page

Rocky Mountain Oil and Gas Association v. Watt, 696 F.2d 734 (10th Cir. 1982) 24

Rosette, Inc., et al. v. United States of America, et al., 141 F.3d 1394 (10th Cir. 1998) 5, 8

Sierra Club, et al. v. Hotel, et al., 848 F.2d 1068 (10th Cir. 1988) 24

Smith v. Denniff, 60 P. 398 (Mon. 1900) 21

Southern Utah Wilderness Alliance v. Dabney, et al., 222 F.3d 819 (10th Cir. 2000) 24

Stockley v. United States, 260 U.S. 532 (1923) 23

United States v. Price, 111 F.2d 206 (10th Cir. 1946) 9

United States v. Union Oil Co. of Cal., 369 F.Supp. 1289 (N.D. Cal. 1973), *rev'd*, 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977) ..... *passim*

Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983) 7, 19, 24

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1916 Stock Raising Homestead Act, 43 U.S.C. § 291, *et seq.* (1916) ..... *passim*

Federal Land Policy Management Act, 43 U.S.C. § 1701, *et seq.* (1976) 23

Geothermal Development and Western Water Law, 4 UTAH L. REV. 773 (1979) 18

Geothermal Steam Act, 30 U.S.C. § 1001, *et seq.* (1970) 4, 6, 7

Homestead Act, 12 Stat. 392, 43 U.S.C. § 161 *et seq.* (1874) 9

Mineral Leasing Act of 1920, 30 U.S.C. § 193 (1920) 24

TABLE OF AUTHORITIES – Continued

Page

National Park Service Organic Act, 16 U.S.C. § 1, *et seq.* (1996) 24

Taylor Grazing Act, 43 U.S.C. § 315, *et seq.* (1936) 10

30 U.S.C. § 1020 2

30 U.S.C. § 1020(b) 11, 13, 18

30 U.S.C. § 51 ..... 12, 21

30 U.S.C. §§ 21-54 (1982) 18

43 U.S.C. § 1701 24

43 U.S.C. § 299 ..... 2, 19, 20

43 U.S.C. § 301 2

OTHER AUTHORITIES

Black's Law Dictionary, 5th Edit., West Law Publishing (1979) 17, 25

H.R. Rep. No. 1544, 91st Cong. 2d Sess. 3 (1970) Reprinted in 1970 U.S.C.C.A.N. 5113, 5115 11

Interior Dec. Mem. M-36625 (August 28, 1961) 11, 14

N.M. Const., art. XVI 25

Op. Solic. Dept. Interior M-36938, 88 Interior Dec. 813, 816 (June 11, 1981) 18, 23

Ralph B. Konstant, Geothermal Law – The Last and Next Twenty-Three Years, 37 ROCKY MTN. MIN. L., § 2.03[2], at 2-29 (1991) 15

Silvia Harrison, Comment, Disposition of the Mineral Estate on United States Public Land: A Historical Perspective, 10 PUB. LAND LAW REV., 131, 152 (1989) 19

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico granting the United States' motion for summary judgment appears at Appendix 25 to this petition and is published at 64 F.Supp.2d 1116. The Tenth Circuit Court of Appeals' opinion affirming the district court's decision appears at Appendix 1 to this petition, and is published at 277 F.3d 1272. The Tenth Circuit Court of Appeals' order denying rehearing and rehearing en banc appears at Appendix 50 to this petition and is not published.

STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals entered its opinion and order on January 22, 2002, and denied rehearing and rehearing en banc on March 28, 2002. This petition for writ of certiorari is timely filed within 90 days of the denial of petition for rehearing and rehearing en banc. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

43 U.S.C. § 299 (1994) of the Stock Raising Homestead Act of 1916, as well as 30 U.S.C. § 1020 of the Geothermal Steam Act, are reprinted in the Appendix at 52, 53.

STATEMENT OF THE CASE

Plaintiffs are a collection of related corporations controlled by Dale Burgett or members of his immediate family. Plaintiff Rosette, Inc. (Rosette) owns the surface estate to certain real property in Section 7 Township 25 South Range 19 West, Hidalgo County, New Mexico. Rosette traces its title to patent No. 1077955 and patent No. 1059123 issued in the 1930's by the United States. Appendix 79-82 (hereinafter [App. ___]) The patents were issued pursuant to the Stock Raising Homestead Act (SRHA) enacted December 29, 1916. 43 U.S.C. §§ 299, 301 (1994); Law of Mar. 4, 1923, ch. 245, § 2, 42 Stat. 1445 (repealed 1976); Law of Dec. 29, 1916, ch. 9, §§ 1-8, 10, 39 Stat. 862-64, 65 (repealed 1976). Under these patents the United States reserved "all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine and remove same pursuant to the provisions and limitations of the Act of December 29, 1916." [App. 53, 54]

Rosette operates greenhouses for the production of roses. The roses are planted into the ground. The roses are watered from wells permitted for "irrigation within greenhouses and related purposes". [App. 70, 71] Rosette uses hot water obtained from certain wells in Section 7, permitted for "irrigation within greenhouses and related purposes", for supplemental heat in the winter months by

passing the water through pipes and allowing the heat to radiate. [App. 71]

All of the heat utilized by Rosette is used on-site. No heat is sold by Rosette or is otherwise used to generate energy for sale by Rosette to others. No heat is transported off of Rosette's surface estate. The roses grown by Rosette are sold both on and off the premises. [App. 71, 72]

On May 5, 1948, the New Mexico State Engineer declared the upper Animas Valley, which includes Section 7, Township 25 South, Range 19 West, as the Animas Valley Underground Water Basin, and closed the area to further ground water appropriation after June 14, 1948. [App. 68] Beginning in 1948, several irrigation wells were drilled in Section 7, and underground water right declarations submitted to the State Engineer's office prior to June 14, 1948. One well drilled in Section 7 encountered water as hot as 240° Fahrenheit. [App. 68] By 1950, slightly more than half of the western side of Section 7 was under irrigation. Slightly less than half of the western side of Section 7 was still under irrigation in 1955. [App. 69]

A report prepared by H.O. Reeder in 1957 entitled "Ground Water in Animas Valley, Hidalgo County, New Mexico: New Mexico State Engineer Technical Report 11" shows four thermal wells located in the eastern side of Section 7 by 1957. [App. 69] Two of the wells drilled in Section 7 were identified by the State Engineer's office permits A-64 and A-65. [App. 69]

Plaintiff Burgett Investment, Inc. (BII) has permits to beneficial use of 450 acre feet of water per annum issued by the State Engineer's Office beginning in 1978. These permits are under Applications No. A-36A, A-36B, A-64 and A-65. These rights were transferred by BII in 1978

from their location in Section 4, Township 26 South, Range 20 West, to Section 7, Township 25 South, Range 19 West. Permits A-64 and A-65 relate to the original hot wells on Section 7 described in Reeder's report. BII presently has valid beneficial use of ground water for "irrigation within greenhouses and related purposes." [App. 69]

The wells in Section 7 produce water with temperatures ranging from 80° Fah. to 240° Fah. Total dissolved solids of this water is generally less than 1400 milligrams per liter. [App. 71] Beginning in 1936 beneficial use of the ground water in the western side of Section 7 has been made for irrigation, stock watering and domestic uses, including drinking water. [App. 71] Use of water from wells in Section 7 for domestic and livestock purposes occurred well prior to the passage of the Geothermal Steam Act, 30 U.S.C. § 1001, *et seq.* (1970) in 1970. [App. 71]

In 1978 the United States entered lease, NM 34790, with Amax for the geothermal resources located within Section 7. BII became the designated operator under the Amax lease, under an agreement with Amax which provides that BII has no right to drill deeper than 1000 feet without obtaining prior written consent of the BLM. [App. 76]

Amax subsequently assigned lease NM 34790 to Steam Reserve Corporation. [App. 76] Steam Reserve drilled well 55-7 to a depth greater than 1000 feet in 1984. [App. 77] Steam Reserve subsequently obtained approval from BLM to plug and abandon well 55-7. [App. 77]

Rosette filed a Complaint on November 24, 1993 challenging the United States' asserted ownership and regulatory authority over the heat in the water used to

heat greenhouses by Rosette. District Court Civil Docket, Document 1, [hereinafter Doc. ___] The parties filed Stipulated Facts on March 10, 1995, setting forth stipulated facts and entering the Administrative Record and certain exhibits into evidence. [App. 67] On April 10, 1996, the District Court ruled that Rosette's action was barred by limitations and dismissed Rosette's Complaint. [Doc. 46]

Rosette was thereafter allowed to amend its Complaint to assert declaratory relief as to alleged past due royalties owing, bonding issues, and metering requirements. [Doc. 49] The United States filed an Answer and thereafter a Counterclaim for past due royalties, and seeking to enjoin Rosette to maintain a certain metering system and to post additional bond. [Docs. 55, 59]

On June 11, 1996, the District Court certified its April 10, 1996 Order as a final order on the statute of limitations. [Doc. 54] On appeal, the Tenth Circuit Court of Appeals ruled Rosette's original Complaint to quiet title was barred by limitations. See *Rosette, Inc., et al. v. United States of America, et al.*, 141 F.3d 1394 (10th Cir. 1998).

In 1997 Rosette, Inc. applied to the State Engineer's Office and received an exploration well permit to divert water from well 55-7 to determine aquifer characteristics. [App. 78] Rosette reopened well 55-7, and installed a pump on the well with the intent of using the well in its commercial operation. [App. 78]

In December 1998, the United States filed a Second Amended Counterclaim to enjoin Rosette from utilizing hot water at depths of greater than 1000 feet in lands covered by BLM geothermal lease NM 34790, and seeking damages for trespass. [Doc. 122] Rosette answered the

counterclaim raising ownership to the heat in the water as an affirmative defense to the United State's claim for trespass and injunctive relief. The United States and Rosette filed cross motions for summary judgment on the Second Amended Counterclaim. [Doc. 125, 127]

The District Court granted summary judgment to the United States, and denied Rosette's motion for summary judgment. The District Court enjoined Rosette's use of hot water located at depths greater than 1000 feet within lands covered by BLM Geothermal Lease NM 34790, and reserved the damages issue for further evidence. [App. 43, 44] Subsequently, the parties stipulated to damages, and a judgment was entered September 20, 2000. [App. 45] The judgment contained language certifying it as a final order on the ownership issue.

On appeal the Tenth Circuit Court of Appeals affirmed the district court. [App. 1] Rosette's Petition for Rehearing and Rehearing En Banc was denied March 28, 2002. [App. 50]

The United States claims entitlement to heat within water pumped from well 55-7, as well as the other wells located upon Rosette's surface estate by virtue of the Steam Act, 30 U.S.C. § 1001 *et seq.* (1970). Rosette claims the heat in such water is appurtenant to its SRHA surface estate, and was conveyed to the patentee by the United States in the patents issued in the 1930's.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. This proceeding involves the important question of the scope of a patentee's estate under the 1916 Stock Raising Homestead Act, which should be settled by this Court.

This proceeding involves an issue of an exception of importance, namely the scope of a patentee's estate under the 1916 Stock Raising Homestead Act, 43 U.S.C. § 291, *et seq.* (SRHA). As noted in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983), more than 33,000,000 acres of land patented under the SRHA is administered by the United States. This decision could have ramifications for many western landowners.

In this proceeding, the United States asserts that the heat in water utilized by Rosette is owned by the United States by virtue of the 1970 Geothermal Steam Act, 30 U.S.C. § 1001, *et seq.*, despite its acknowledgment that in 1916, when the SRHA was enacted, Congress did not intend to reserve geothermal resources in the SRHA minerals reservation. This Court has yet to address the issue of the interplay between a SRHA patentee's surface estate and the Geothermal Steam Act.

It is important this Court address this issue because not all associated geothermal resources should automatically be classified as SRHA minerals, particularly when the hot water utilized is potable, has historically been used for domestic purposes predating the Steam Act, constitutes a property interest of the SRHA patentee under state law, and the hot water is otherwise valuable in developing the surface estate. This Court should define the parameters of the Steam Act vis-a-vis a patentee's property interests and

valid existing rights developed on the SRHA surface estate, because of the wide ranging consequences of that decision upon state permitted water rights and surface development in western states.

II. The Tenth Circuit's ruling in this proceeding is contrary to this Court's ruling in *Amoco Production Co. v. Southern Ute Indian Tribe, et al.*, 526 U.S. 865 (1999).

A. The Tenth Circuit's decision allows the meaning of "minerals" in the 1916 SRHA to fluctuate in perpetuity.

This Court emphasized that construction of a minerals reservation in a United States land patent must be made in light of the contemporaneous congressional understanding at the time of the drafting of the reservation. *Southern Ute Tribe, supra*, 526 U.S. at 873. Specifically, this Court defined the issue to be decided as not whether a substance would be considered within the specific reservation today, but rather whether Congress so regarded it as within the specific reservation as the reservation language was understood in the ordinary contemporary common meaning at the time. *Id.* at 873, 874.

While acknowledging that at the time of the passage of the SRHA, Congress did not specifically intend that geothermal resources be retained within the mineral reservation, the Tenth Circuit took the approach of defining the issue to be decided as "not what Congress intended to reserve, but rather what Congress intended to give away in its grant to the landholder in the SRHA". See *Rosette, Inc., et al. v. United States of America, et al.*, 277 F.3d 1222, 1229 (10th Cir. 2002) [App. 12] The Tenth Circuit narrowly construed contemplated surface owner

use under the SRHA to conclude that on-site use of heat in water Rosette pumps was not a contemplated surface owner use under the SRHA. The Tenth Circuit reasoned that if the heat was not a contemplated surface use under the SRHA at the time of its enactment, that it must fall within the SRHA minerals reservation. By shifting the focus away from construction of the minerals reservation, and then narrowly construing the policy of underlying the SRHA surface estate, the Tenth Circuit sidesteps the irrefutable conclusion that heat was not considered a reserved mineral by Congress in 1916 when it enacted the SRHA.

The Tenth Circuit's approach in redefining the issue to be decided directly conflicts with this Court's opinion in *Southern Ute Tribe*, *supra*, and with the Ninth Circuit's holding in *United States v. Union Oil of California*, 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977). In *Southern Ute Tribe*, *supra*, this Court sought to encourage settlement of the West by providing land in fee simple absolute to homesteaders. *Id.* at 868. Additionally, this Court noted that land patents issued under the Coal Lands Act conveyed the entire estate, less only the coal, to the patentee. *Id.* at 867. In *Union Oil*, *supra*, the Ninth Circuit was clear that whatever is not within the SRHA minerals reservation was conveyed to the patentee. *Id.* at 1279.

It is settled law that a patent issued under the Homestead Act, 12 Stat. 392, 43 U.S.C. § 161 *et seq.*, without a reservation conveys the entire estate. *United States v. Price*, 111 F.2d 206, 208 (10th Cir. 1946). It is only logical that a patent issued under the SRHA, with a minerals reservation, conveys the entire estate less only the minerals

that were reserved. *Id.* The SRHA is not analogous to a surface lease, or permit, such as the Taylor Grazing Act, 43 U.S.C. § 315, *et seq.* See *Union Oil*, *supra*, at 1279.

To focus on "what Congress intended to give away" results in the absurdity of a "third estate". While the heat was not intended to be reserved in the 1916 SRHA minerals reservation, according to the Tenth Circuit, neither was its use a contemplated SRHA surface owner use. The consequence of the Tenth Circuit's approach is that heat used by Rosette falls outside both the minerals reservation and the surface estate into a third category, or third estate. Through deference to the United States the Tenth Circuit "defaults" everything that falls into this third category into the minerals reservation regardless of Congressional intent in 1916.

Using this approach, the Tenth Circuit has allowed the United States to re-draft the 1916 SRHA minerals reservation to effectively state "coal and all other minerals, *and anything else in the future that becomes of value to the United States*". (Emphasis added) The consequence of this approach is to allow the SRHA minerals reservation to fluctuate in perpetuity to include whatever the United States thinks is important or valuable at the time. This is contrary to existing Supreme Court precedent addressing SRHA split estates, in which whatever is not reserved to the United States in the patent, is conveyed to the patentee at the time the patent is issued.

B. In 1916 Congress did not intend to reserve heat or hot water in the SRHA minerals reservation.

1. In 1916, steam and hot water were not considered minerals reserved in the SRHA patent minerals reservation.

Geothermal was not considered a viable electrical energy source until the 1950's. H.R. Rep. No. 1544, 91st Cong. 2d Sess. 3 (1970) *Reprinted in* 1970 U.S.C.C.A.N. 5113, 5115 (hereinafter House Report ___). Prior to passage of the Steam Act, the Department of Interior's position was that geothermal steam was nothing more than water at a very high temperature, and thereby not subject to the mineral reservation of the SRHA. See Interior Dec. Mem. M-36625 (August 28, 1961); House Report, *supra*, at 5126-27. The Department of Interior had indicated it was not empowered to deal with the use of geothermal resources on federal lands. *Id.* The only allowable inference is that Congress, in 1916, did not intend to reserve hot water and steam in the SRHA minerals reservation.

In fact, during the drafting of the Steam Act, the House Interior and Insulation Affairs Committee could not bring itself to declare that geothermal steam was a mineral. It added § 1020(b) to the Steam Act providing for a quiet title action where development without a lease was imminent. *Id.* 5119-5120. See 30 U.S.C. § 1020(b), [App. 52]. The quiet title action was to be brought in the district in which such lands were located, indicating Congressional intent that each alleged resource be dealt with on a case-by-case basis.

Water was not considered a "mineral" in 1916, nor is it considered a "mineral" today. Under the 1872 Mining Law,

a perfected state water right constitutes a vested property right. 30 U.S.C. § 51. 30 U.S.C. § 51 was derived from the Act of July 26, 1866, c. 262, § 9, 14 Stat. 253. It is a recognition by Congress of a pre-existing right constituting a valid claim to its continuance. *Broder v. Natoma Water and Mining Co.*, 101 U.S. 274 (1879). More recently, in *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604 (1978), this Court, reversing the Ninth Circuit, held that water was not a locatable mineral and private water rights on federal lands are governed by local customs and laws. *Id.* at 604, 614.

In *Amoco Production Company, et al. v. Southern Ute Tribe, et al.*, 526 U.S. 865 (1999), a case in which the intent of a 1909 "coal" reservation was at issue, this Court noted that in 1909 and 1910, most dictionaries defined coal as a solid fuel, distinct and separate from "marsh gas" or "methane", now referred to as CBM gas. *Southern Ute Tribe* at 874. This Court held that the government's coal reservation in a Coal Lands Act patent did not encompass CBM gas. *Id.* at 880. Just as Congress did not expressly reserve natural gas in the 1909 and 1910 Coal Lands Act patents, it also did not expressly reserve "steam", "heat" or "geothermal" in the 1916 SRHA reservation. As these did not fall within the most natural interpretation of "minerals" in 1916, failure to expressly reserve steam, heat or geothermal in the 1916 SRHA reservation strongly suggests that geothermal and its related resources were not intended to be reserved.

2. The hot water used by Rosette furthers development of the surface estate, unlike the Geysers in *Union Oil*.

a. The Geyser's highly toxic, highly mineralized water is fit only for the production of energy for sale off site.

The first cases which dealt with the Steam Act and its application to the mineral reservation of the Homestead Act centered around the geothermal resources at The Geysers, which at the time was the only geothermal powered electrical operation in the country. House Report. *supra* note 6 at 5115. In *United States v. Union Oil Co. of Cal.*, 369 F.Supp. 1289 (N.D. Cal. 1973), *rev'd,* 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977), (hereinafter *Union Oil I*), the United States Attorney General filed suit pursuant to 30 U.S.C. § 1020(b) of the Steam Act, seeking to quiet title to the geothermal resources being used on land which was patented under the Homestead Act. *Union Oil I*, 369 F.Supp. at 1289. The District Court for the Northern District of California granted the Defendants' Rule 12(b)(6) motion ruling that geothermal steam and associated geothermal resources are not "minerals" within the meaning of the reservation of the Homestead Act. *Id.* at 1299-1300. The Court in *Union Oil I* defined the central issue of the case as "the meaning and scope of the mineral reservation of the Stock Raising Homestead Act and in the patents granted thereunder." *Id.* at 1291. After examining the legislative history of the SRHA, the Court, in *Union Oil I* arrived at three conclusions. First, the legislative history showed that the minerals reservation provision played a small role in congressional consideration of the SRHA. *Id.* at 1293. Second, Congress intended

that the Homesteader or Patentee receive title to the land that was granted, with the full minerals estate being reserved to the federal government. *Id.* Finally, Congress did not intend geothermal steam and associated geothermal resources to come within the minerals reservation, since "such fluids would not have come within the definitions of minerals in force and usage at that time." *Id.*

The court specifically rejected the government's position that anything found in the subsurface estate constituted either a mineral or a part of the minerals estate. *Id.* at 1294. The court in *Union Oil I* noted that under that argument, water, which is usually a subsurface resource in the west, would be considered part of the subsurface estate, thereby depriving the homesteader of a necessary component of the surface and, ultimately rendering the land useless. *Id.* at 1295. This scenario would undermine the primary intent of the SRHA to settle and make productive use of semiarid lands in the West. The Court noted that if Congress intended to reserve the entire subsurface estate to the government, it would have said so. *Id.* at 1294.

The *Union Oil I* the court essentially concluded that geothermal steam and associated geothermal resources are nothing more than superheated water, and since water is not a "mineral", it follows that geothermal is not either. This conclusion is consistent with the pre-Steam Act position of the United States Department of Interior. From at least 1961 until the enactment of the Steam Act in 1970, the Interior Department had consistently taken the position that it was powerless to regulate geothermal use under the SRHA's mineral reservation clause since geothermal was, quite simply, hot water. *See* Interior Dec.

Mem. M-36625 (August 28, 1961); House Report, *supra* note 6, at 5126-28.

The United States appealed the *Union Oil I* decision. The Ninth Circuit Court of Appeals reversed the District Court. *United States v. Union Oil Co. of Cal.*, 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977), (hereinafter Union Oil II). The Ninth Circuit took a narrow view of the purposes behind granting of land to patentees under the SRHA. It limited the patentee's use of the land to stock raising or forage farming, and reasoned that use of subsurface resources for other purposes would be contrary to the mineral reservation clause of the SRHA. *Id.* at 1276. The court in *Union Oil II* even stated that "water itself may be classified as minerals." *Id.* at 1273-74.

In *Union Oil II* the court attempted to harmonize the legislative intent behind both the SRHA and the Steam Act through a balancing process. It noted that the policy underlining the SRHA was the development of land into self-sufficient agricultural units, while the policy underlying the minerals reservation of the SRHA was to retain government control of subsurface fuel sources, thereby encouraging the development of fuels by private industry under government regulation. *Id.* at 1274, and 1275 n.8.

In *Union Oil II* the court determined that the resources at The Geysers were a viable source of power for electrical generation. Further, the resource at issue was not fit to be used for agricultural purposes due to its highly toxic, highly mineralized content. *See* Ralph B. Konstant, *Geothermal Law – The Last and Next Twenty-Three Years*, 37 ROCKY MTN MIN.L., § 2.03[2], at 2-29 (1991). Thus, it would not further agricultural development of the SRHA to find that The Geysers were water

since that resource could not sustain livestock. *Union Oil II*, 549 F.2d at 1279. The only possible use of the resource at issue was for electrical generation purposes. Hence, the geothermal resource in the *Union Oil* cases were held to constitute a mineral.

b. The characteristics of the hot water used by Rosette is different from the characteristics of the Geysers.

The hot water utilized by Rosette does not meet the mineralization criteria set out in *Union Oil II*. The hot water utilized by Rosette has total solids generally less than 1400 milligrams per liter, and has been used for irrigation of field crops, stock watering, and drinking water prior to the Steam Act. [App. 71] The hot water is also permitted for irrigation and livestock use, if Rosette chooses to use the water for that purpose. *Id.* The hot water is not highly mineralized as that term is used to describe the "Geysers" in California. See *Geothermal Kinetics, Inc. v. Union Oil Company of California*, 75 Cal. App. 3d 56, 58, 141 Cal. Rptr. 879 (App. 1 Dist. 1977), in which the Court stated "geothermal resources are not necessary or useful to surface owners, other than as a source of electricity."

The U.S. does not claim ownership of the water, only the heat. [App. 72] Heat is a form of energy associated with the random motion of molecules. Webster's Third New International Dictionary, unabridged, G&C Merrian Company, 1976. It can be produced in a substance through compression, or it can flow to a substance by contact with

or radiation from bodies at higher temperatures. *Id.* It is a property found in plants and animals, as well as minerals, and does not meet the definition of inorganic. Along with light and air, it is one of the properties described as adjunct, appended, or annexed to land, when used to benefit the land, under the definition of "appurtenant" in Black's Law Dictionary, 5th Edit., West Law Publishing (1979).

The SRHA patent herein conveys Section 7 "with all appurtenances" to the patentee. [App. 67] The heat Rosette uses is appurtenant to essentially potable hot water, valuable for surface development. It is not appurtenant to highly mineralized superheated water whose only value is the generation of electricity. Use of this resource under New Mexico water law for SRHA purposes, dating back to 1948, validates Rosette's assertion that the heat in the water utilized is valuable for SRHA surface estate development.

C. Congress did not intend all associated geothermal resources referenced in the Steam Act to be subject to the 1916 SRHA minerals reservation.

By classifying the hot water Rosette uses to heat greenhouses as a mineral the Tenth Circuit has, in effect, determined that any "associated geothermal resource" is subject to the 1916 SRHA minerals reservation. This is contrary to *Union Oil II*, which did not go as far as to declare all geothermal and associated geothermal resources subject to the minerals reservation clause of the SRHA, and is also contrary to the opinions of the Department of Interior.

In 1981, an opinion of the Solicitor states that although the Court in *Union Oil II* leaned in their discussion toward categorizing geothermal resources as minerals, the Court never did so. Op. Solic. Dept. Interior M-36938, 88 Interior Dec. 813, 816 (June 11, 1981). Instead "the case turned upon the nature and purpose of the statutory reservation rather than the nature of the resource involved." *Id.* at 817. Thus "neither the Ninth Circuit nor any other Court has held . . . that geothermal resources are minerals for the purposes of the minerals leasing laws." *Id.* at 818.

The Department of Interior's view is congruous with § 1020(b) of the Steam Act, which calls for an authoritative judicial determination each time the Department of Interior believes a particular geothermal well is subject to the minerals reservation clause. To conclude that *Union Oil II* conclusively ruled that all geothermal steam and associated resources are a mineral results in an infringement of water rights of the homesteader, since as discussed herein, it is possible for geothermal resources to be used as water for irrigation and other agricultural purposes. Furthermore, some geothermal resources do not constitute a feasible source of electrical energy, thus regulating the resource does not further the intent behind the Steam Act. *See* Owen Olpin, et al., *Geothermal Development and Western Water Law*, 4 UTAH L. REV. 773, 799 (1979).

Moreover, this Court has clarified that the proposition of the Ninth Circuit that water may be classified as "minerals" is not valid. In *Andrus v. Charlestone Stone Products Company, Inc.*, 436 U.S. 604 (1978), this Court held that water is not a valuable "mineral" as that term is used in the mining law of 1872, 30 U.S.C. §§ 21-54 (1982),

which is today still the "basic law of governing disposition of locatable minerals." Silvia Harrison, *Comment, Disposition of the Mineral Estate on United States Public Land: A Historical Perspective*, 10 PUB. LAND LAW REV., 131, 152 (1989).

III. The Tenth Circuit's decision is contrary to the common interpretation of "minerals" within 42 U.S.C. § 299 because Rosette does not remove or sever the heat.

Western Nuclear, *supra*, indicates that when a dispute exists as to what is within the SRHA minerals reservation, one should look to the manner of severance. *Id.* at 462 U.S. 52. A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have separate value. *Id.* at 53. 43 U.S.C. § 299, contemplates "mining or removal" of the reserved minerals. See 43 U.S.C. § 299. [App. 53] In this case no removal or severance occurs as that term is understood in minerals law. *Occidental Geothermal, Inc. v. Simmons*, 543 F. Supp. 870, 874-875, 875 N.8 (N.D. Cal. 1987). As noted in *Occidental*, *supra,* removal means utilization of geothermal resource to produce energy. *Id.* at 874-875. This does not encompass onsite use of heat to power production of goods other than energy. *Id.* at 875, N. 8.

Geothermal must be exploited, if it is to be exploited at all, on the lands from which is to be removed. *Id.* at 874. In this respect geothermal energy differs from other SRHA reserved minerals, such as coal and oil. *Id.* The Court in *Occidental* stated that for this reason removal of geothermal resources is inextricably connected to their utilization. Because these resources cannot be removed without first

being utilized, the two processes in the case of geothermal energy are one. *Id.* at 874, 875.

The 1916 SRHA's language that reserves to the United States "the right to prospect for, mine and *remove*" minerals is therefore capable of bearing a meaning that encompasses the utilization of geothermal resources *to the extent that utilization and removal are the same to process.* *Id.* at 875. (emphasis added) But the *Occidental* court noted that this statement is true *only* to the extent that the energy contained in the steam *must* be converted into some other form before it can be feasibly removed and put to work elsewhere. *Id.* at 875, N. 8. The word "removal" in the SRHA minerals reservation is not capable of bearing a meaning that encompasses on-site use of geothermal energy to power the production of goods other than energy. *Id.*

Rosette does not convert the heat in the water to any other form of energy prior to utilizing it on-site to power the production of roses planted in the ground which are harvested and then sold in commerce. Rosette utilizes heat appurtenant to the water it pumps, under state permits, not federal permits, for supplemental heating by running water through pipes. Rosette is not "removing" or "extracting" mineral resources as contemplated by the SRHA minerals reservation language. Accordingly, Rosette's use of the hot water in this case does not utilize a resource reserved to the United States within the meaning of the SRHA minerals reservation language of 43 U.S.C. § 299.

V. The Tenth Circuit's decision impairs Rosette's valid existing rights under the SRHA and New Mexico water law.

A. Vested State Water Rights are Protected from Federal Encroachment.

According to the provisions of the 1872 Mining Law, a perfected state water right which has been recognized and acknowledged by local customs or laws, constitutes a vested property right. 30 U.S.C. § 51. This position has been upheld in numerous cases. *See, e.g., Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967); *Haight v. Costanich*, 194 P. 26 (Cal. 1920); *Smith v. Denniff*, 60 P. 398 (Mon. 1900).

For example, in *California v. United States*, 438 U.S. 645 (1978), the U.S. Supreme Court in summarizing the history of the relationship between state water rights and the Federal Government, held protection of vested water rights to be a well settled position. A vested right has been defined as:

> . . . the power to do certain actions or possess certain things lawfully and is substantially a property right which may be created either by common law, by statute, or by contract. . . .

Ricks Exploration Company v. Oklahoma Water Resources Bd., 695 P.2d 498, 504 N. 23 (Okla. 1984). A vested interest will not be deemed abrogated or impaired except by explicit legislative extinguishment effective prospectively. *Id.* at 504. Where vested rights are acquired under existing state laws, no branch of government may take them away except by due process of law. *Id.* at 505.

The original wells utilizing the hot water on Rosette's property were drilled in 1948 by Rosette's predecessors-in-interest. [App. 68] This hot water has been put to beneficial use through the years for livestock and irrigation, as well as domestic use. [App. 71] Rosette has transferred additional water rights, perfected prior to the Steam Act, for use on Rosette's surface estate. [App. 69, 70] The state engineer permitted beneficial use of this water for "irrigation within greenhouses and related purposes". [App. 70] It is stipulated that Rosette has the right under state law to utilize this water for such uses as are permitted under state law. [App. 71] Additionally, Rosette has a state engineer permit for beneficial use of water from Well 55-7. [App. 78]

Several cases have upheld the proposition that groundwater belongs to the owner of the surface estate. In *Ricks*, *supra*, the Oklahoma Supreme Court reasoned that the owner of the surface estate owns the underlying ground water and that ownership of the ground water constitutes a vested right. *Ricks*, at 695 P.2d 504. Similarly, the Texas Supreme Court has stated that the "water is part of the surface estate according to the ordinary normal use of words conveying or reserving minerals". *Robinson v. Robins Petroleum Corp., Inc.*, 501 S.W.2d 865, 867 (Tex. 1973). Further, "the water itself is an incident to surface ownership in the absence of specific conveyancing language to the contrary". *Id.*

B. Valid existing rights under the SRHA protect Rosette's use of the heat in the water.

The Department of Interior has long recognized valid existing rights, and has defined those rights as "those

rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion". *See* Op. Sol. Dept. Interior M-36910 (Supp.), 88 I.D. 909, 912 (Oct. 5, 1981). Valid existing rights may arise by statute or by exercise of secretarial discretion. *Id.*

Protection of valid existing rights was recognized as early as 1879 by the United States Supreme Court. *Broder v. Natoma Water and Mining Co.*, 101 U.S. 274 (1879). The Supreme Court in *Broder* stated that rights to use water from mining, agricultural, and manufacturing which have vested and accrued under local customs, laws and decisions constitute a vested right and will be maintained and protected. *Id.* at 275.

The Supreme Court in dealing with Homestead Act issues, has defined existing valid rights as something less than a vested right. *Stockley v. United States*, 260 U.S. 532, 544 (1923). In *Stockley*, in interpreting an existing valid claim under the Homestead Act, the Supreme Court stated that "the effect of a preliminary homestead interest is to confer upon the entryman, an exclusive right of possession which continues so long as the entryman complies in good faith with requirements of the Homestead Law". *Id.* at 544. This view is reaffirmed in *California Oregon Power Company v. Beaver Portland Cement*, 295 U.S. 142 (1935).

The Steam Act, as other minerals leasing laws, is managed under the Federal Land Policy Management Act, 43 U.S.C. § 1701 *et seq.* The savings provisions of the Federal Land Policy Management Act, provides that

> (a) Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid right or authorization

existing on the date of approval of this Act. [Oct. 21, 1976].

(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

See Section 701 of Pub.L. 94-579, codified at 43 U.S.C. § 1701, Historical Note, *Rocky Mountain Oil and Gas v. Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980), *reversed on other grounds*, 696 F.2d 734 (10th Cir. 1981). See also Section 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (1920). It is sufficient to create a vested right in Rosette that its predecessor in interest obtained the SRHA patent prior to passage of the Steam Act. *Getty Oil v. Andrus*, 607 F.2d 253 (9th Cir. 1979).

The valid existing rights doctrine has been recognized by the Courts under various federal land management statutes, including the Federal Land Policy Management Act, *supra*, and the National Park Service Organic Act, 16 U.S.C. § 1, *et seq*. See *Southern Utah Wilderness Alliance v. Dabney, et al.*, 222 F.3d 819 (10th Cir. 2000); *Sierra Club, et al. v. Hodel, et al.*, 848 F.2d 1068 (10th Cir. 1988); *Rocky Mountain Oil and Gas Association v. Watt*, 696 F.2d 734 (10th Cir. 1982). In discussing valid existing rights in *Southern Utah Wilderness Alliance*, *supra*, the Tenth Circuit indicated that Utah Shared Access had no right to prevent closure of Salt Creek Road, a Jeep trail, for inclusion in a national park, because it had not established a "legally cognizable right" to use the road existing at the time of establishment of the park. *Id*. at 826, No. 6.

The SRHA contemplated use of water to develop the surface estate. *Watt v. Western Nuclear*, 462 U.S. 36, 53 (1983). Rosette has a "legally cognizable right" to use the

hot water in issue by virtue of its permits from the State Engineer of New Mexico, including the permit to utilize water from well 55-7. Indeed, Rosette's interests in use of the water is a protected property interest under New Mexico law. See N.M. Const., art. XVI, *Lindsey v. McClure*, 136 F.2d 65, 70 (10 Cir. 1943). Rosette utilizes the heat in the water on-site, and does not sever and sell it as an energy source. It would be commercially impracticable to sever the heat from the water for sale off site.

The heat Rosette uses is "appurtenant" to its property interest in the water. Black's Law Dictionary defines "appurtenant" as:

> "belonging to, accessory or incident to, adjacent, appended or annexed to. . . . A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage of light, air *or heat* from or across the land of another. (emphasis added)

Black's Law Dictionary, Fifth Edition, West Law Publishing (1979). The heat Rosette uses is appurtenant to essentially potable hot water, valuable for surface development. It is not appurtenant to highly mineralized superheated water whose only value is the generation of electricity. Use of this resource under New Mexico water law for SRHA purposes, dating back to 1948, establishes Rosette's valid existing right to the heat in the water for on-site utilization.

It is clear that the federal policy underlying the SRHA and the minerals leasing laws protect vested rights which accrue prior to enactment of subsequent legislation.

Rosette's use of the hot water falls within the ambit of these protections.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROSETTE INCORPORATED, a New Mexico corporation; BURGETT INVESTMENT, INCORPORATED, a New Mexico corporation; BURGETT GEOTHERMAL GREENHOUSE, INCORPORATED, a New Mexico corporation,

Plaintiffs-Counter-Defendants-Appellants,

v.

UNITED STATES OF AMERICA; JOHN ASHCROFT, as Attorney General; DEPARTMENT OF INTERIOR; GALE A. NORTON, Secretary of Interior of the United States; JAMES BACA, in his official capacity as Director of Bureau of Land Management; WILLIAM CALKINS, in his official capacity as State Director of Bureau of Land Management; LINDA RUNDELL, in her official capacity as Las Cruces District Manager of Bureau of Land Management,

Defendants-Counter-Claimants-Appellees.

No. 00-2453

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MEW MEXICO
(D.C. No. CIV-93-1379-BB)

(Filed Jan. 22, 2002)

Stephen E. Hosford, of Martin, Lutz, Roggow, Hosford & Eubanks, P.C., Las Cruces, NM, for the appellants.

Tamara N. Rountree, Assistant United States Attorney (Norman C. Bay, United States Attorney, and John W. Zavitz, Assistant United States Attorney, on the brief), Albuquerque, NM, for the appellees.

Before **BRISCOE** and **MURPHY**, Circuit Judges, and **OBERDORFER**, Senior District Judge.*

BRISCOE, Circuit Judge.

Plaintiffs Rosette Incorporated, et al. (Rosette), appeal from the district court's grant of summary judgment in favor of the United States as to the ownership of geothermal resources on property obtained pursuant to patents issued under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § 291 *et seq.*; 42 Stat. 1445 (repealed 1976); 39 Stat. 862-64, 65 (repealed 1976). We affirm,

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* The Honorable Louis F. Oberdorfer, Senior United States District Judge, District of Columbia, sitting by designation.

agreeing with the district court that the *geothermal* resources at issue in this case are "minerals" within the reservation of the patents.

I.

Rosette is a collection of related corporations controlled by Dale Burgett or members of his immediate family. Rosette owns the surface estate to certain real property in Section 7, Township 25 South, Range 19 West, Hidalgo County, New Mexico, by virtue of patents issued in 1933 and 1935 under the SRHA. The SRHA permitted any person qualified to acquire land to make a stockraising homestead entry on lands designated by the Secretary of the Interior. 43 U.S.C. § 291. Such designated lands were to be

> lands the surface of which is, in [the Secretary of the Interior's] opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family.

43 U.S.C. § 292.

Under the SRHA, a homesteader could obtain a patent on the land if he resided for three years thereon and made permanent improvements tending to increase the value of the land for stockraising purposes. 43 U.S.C. § 293. However, the SRHA required that the patent issued be "subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect

for, mine, and remove the same." 43 U.S.C. § 299. Rosette's patents contained a reservation of mineral rights by the United States consistent with 43 U.S.C. § 299.

Several wells were drilled in Section 7 in the 1940s and 1950s, one of which encountered water as hot as 240 degrees Fahrenheit. In 1970, Congress enacted the Geothermal Steam Act (hereinafter Steam Act), which granted the Secretary of the Interior the authority to lease geothermal resources, including steam, hot water and hot brines, heat from geothermal foundations and byproducts of geothermal foundations, owned or reserved by the United States. 30 U.S.C. § 1001 *et seq.* The Secretary of the Interior leased the geothermal rights to Section 7 to Amax Exploration, Inc., and later to Lightning Dock Geothermal, Inc. Rosette is a designated operator under the lease through agreements with the various leaseholders, and pays royalties. The lease agreement does not permit Rosette to drill deeper than 1,000 feet without prior written consent.

Rosette is in the business of growing roses in greenhouses for commercial distribution. The roses are planted in the ground. Rosette uses the heat in water from five wells located in Section 7 to heat its greenhouses, after which the water is discharged. No heat is transported off of the surface estate or used to generate other energy. Rosette uses water from wells outside Section 7 for irrigation purposes.

In 1993 Rosette filed an action for quiet title, ejectment, declaratory judgment and permanent injunction against the United States, arguing that geothermal resources are not reserved minerals under the SRHA. The United States filed a counterclaim for past-due royalties

and seeking to enjoin Rosette. The district court dismissed Rosette's claims as barred by the statute of limitations, and this court affirmed. *Rosette, Inc. v. United States,* 141 F.3d 1394 (10th Cir.1998).

Rosette reopened and installed a pump on a capped well, Well 55-7, located in Section 7, intending to use water from that well for the heating of the greenhouse. The depth of Well 55-7 exceeded 1,000 feet. Rosette did not seek permission from the geothermal leaseholder or the United States to utilize the well. As a result of Rosette's actions in reopening Well 55-7, the United States filed its second amended counterclaim to enjoin Rosette from using geothermal resources on its lease located deeper than 1,000 feet. Rosette's answer asked the district court to quiet title as to the geothermal resources against the United States.

The district court heard the second amended counterclaim on cross-motions for summary judgment after the parties had stipulated to numerous facts. The court analyzed the purpose of the SRHA and concluded that, although the SRHA passed in 1916 made no mention of geothermal resources, the definition of minerals as used in the SRHA was broad enough to encompass geothermal resources. The district court therefore found that title to the geothermal resources in Section 7 was vested in the United States as a matter of law, and issued a preliminary and permanent injunction prohibiting Rosette from utilizing the geothermal resources located deeper than 1,000 feet without authorization from the United States and the lessee. The court further ordered Rosette to remove its pump and recap Well 55-7. The parties stipulated as to damages.

II.

Rosette argues that the district court erred in finding that the United States has title to the geothermal resources under Section 7. Rosette's argument essentially advances three points: 1) Geothermal resources as a whole are not "minerals" under the SRHA; 2) even if geothermal resources as a whole may be "minerals" under the SRHA, the particular geothermal resources under Section 7 do not constitute "minerals" under the SRHA; and 3) even if the geothermal resources under Section 7 are "minerals" under the SRHA, Rosette still has the right to use the resources as surfaceholder to advance the purposes of Rosette's homestead.

This case was decided on summary judgment. This court reviews the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Simms v. Oklahoma ex rel. Dep't of Mental Health*, 165 F.3d 1321, 1326 (10th Cir. 1999). The evidence and reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. *See Id.*

Geothermal resources as minerals under the SRHA

The determination of whether geothermal resources are minerals under the SRHA requires interpretation of that Act. The construction and applicability of a federal statute is a question of law, which we review de novo.

United States v. Telluride Co., 146 F.3d 1241, 1244 (10th Cir. 1998).

The United States Supreme Court examined the scope of the mineral reservation in the SRHA in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983). The question at issue in that case was whether gravel extracted from the ground of a patented site was a "mineral" and thus the property of the United States. The Court reasoned that, for a substance to be a mineral reserved under the SRHA, it must not only be a mineral within one or more familiar definitions of that term, but also the type of mineral that Congress intended to reserve to the United States in lands patented under the SRHA. *Id.* at 44. The Court stated that Congress' underlying purpose in severing the surface estate of lands patented from the mineral estate was to facilitate the concurrent development of both surface and subsurface resources, and that while Congress expected homesteaders to use the surface of land for stockraising and raising crops, it sought to ensure that valuable subsurface resources would remain subject to development by other developers who would be more likely to make use of the resources. *Id.* at 47.

Given the underlying purpose of the SRHA, the Court stated that "the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated," that is, stockraising and the raising of forage crops. *Id.* at 52. The Court concluded that in order to qualify as a "mineral" under the reservation of the SRHA a substance must be 1) mineral in character, i.e. inorganic, 2) removable from the soil, 3) usable for commercial purposes, 4) and of such a character that there was no reason to suppose Congress intended it

to be included in the surface estate. *Id.* at 53. The Court determined that gravel came under this definition. *Id.* at 55. The Court buttressed this determination by noting that the Department of the Interior had treated gravel as a reserved mineral under other land-grant statutes, and that federal administrative and judicial decisions had consistently treated gravel as subject to general mining laws unless specifically exempted. Finally, the Court recited the established rule that land grants are construed favorably to the Government, and nothing passes except what is conveyed in clear language, with any doubts resolved in favor of the Government. *Id.* at 59-60.

We have found no decisions since *Western Nuclear* addressing the question of whether geothermal resources are minerals under the SRHA. The issue was squarely addressed in an earlier case decided by the Ninth Circuit. See *United States v. Union Oil Co. of California,* 549 F.2d 1271 (9th Cir. 1977). In *Union Oil*, the court applied an analysis substantially similar to that used in *Western Nuclear.* The court first determined that geothermal resources are actually the result of a process in which magma heats water contained in porous rock strata, and that, at a general level, all of the elements involved in the process, including water itself, could properly be classified as minerals. The court stated that the pertinent question was whether such classification fit Congress' purposes in enacting the SRHA. *Id.* at 1273-74.

The court in *Union Oil* examined in detail the legislative history surrounding the passage of the SRHA. The court noted that, prior to 1909, public lands were disposed of as either wholly mineral or nonmineral in character, which led to inefficiencies and fraud. The SRHA represented a new class of legislation that separated the right

to mine from title to the soil in order to encourage efficiency of use. As did the Court in *Western Nuclear*, the court in *Union Oil* referenced the idea of the legislators that the farmer-stockman who would homestead the land would not be interested in looking for minerals. The court also pointed out that Congress defended the large size of each homestead patent by stating that the grant was limited to the surface estate and that the reservation would " 'cover every kind of mineral.' " *Id.* at 1278 (quoting comments of Congressman Ferris, 53 Cong. Rec. 1171 [1916]). The court noted that the mineral reservation in the SRHA actually was criticized for its until-then unprecedented breadth. The court concluded that the mineral reservation in the SRHA should be read broadly in light of the agricultural purpose of the patent grant itself and the clear purpose of Congress to retain ownership of subsurface resources, particularly those that could be used as sources of energy. As a result, the court held that geothermal resources were titled in the federal government, and reversed the district court's determination to the contrary. *Id.* at 1280-81.

Although *Union Oil* predated the decision in *Western Nuclear*, and thus did not expressly follow the guidelines set forth by the Supreme Court, the analysis employed in both cases is similar. Both courts began by determining whether the resource in question could be classified as a mineral under some definition of that word, and then attempted to determine whether such an interpretation would advance the purpose of the statute, given its legislative history.

Geothermal resources as mineral in character

The first step in the *Western Nuclear* analysis is to determine whether geothermal resources in general are minerals in character, that is, inorganic. *Western Nuclear*, 462 U.S. at 53. Rosette argues the substance in question is the heat from the water, and that heat itself cannot properly be classified as inorganic. Rather, according to Rosette, heat is properly found in plants and animals and is one of the properties, in addition to light and air, which is appurtenant to the property. However, as recognized in *Union Oil*, geothermal resources are not isolated substances and are dependent upon heat from magma being transmitted to water contained in porous rock strata. 549 F.2d at 1273. There is no question that both magma and rock are inorganic in character.

Rosette contends that water cannot be a "mineral," citing *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, (1978). In *Andrus*, the Court held that water was not a "valuable mineral deposit" within the scope of the federal mining statute. However, *Andrus* is not applicable here. The Court in *Andrus* held simply that water could not be categorized as a "locatable mineral" within the legislative intent of the mining act. The Court reasoned that water was so common as to lead to abuses under the mining act, which allowed persons to gain title to valuable federal land by discovering a locatable mineral on the land. However, while the Court in *Andrus* held that water is not a locatable mineral under the mining act, it concluded that water could in fact be a mineral in the broadest sense of the word. *See Id.* at 610. In *Union Oil*, the court determined that water could be classified as a mineral. The court pointed to a wide variety of sources,

including mining treatises and texts on mineralogy in making this determination. *See* 549 F.2d at 1273, n. 5.

We conclude that the geothermal process as a whole is inorganic within the definition set forth in *Western Nuclear*, and thus may be classified as generally mineral in character.

Geothermal resources as removable from soil and usable for commercial purposes

The parties do not dispute that geothermal resources as a whole are removable from the soil and usable for commercial purposes. Therefore, these two parts of the *Western Nuclear* test are satisfied.

Geothermal resources as included by Congress in surface estate

The final requirement is whether "there is no reason to suppose" that Congress intended geothermal resources to be included within the surface estate. *Western Nuclear*, 462 U.S. at 53. Analysis of this requirement entails an examination of the purposes for which Congress intended the land to be used by the various holders of the rights. *See Id.* at 52-60.

It is fairly certain that, at the time of the passage of the SRHA, Congress did not specifically intend that geothermal resources as such be retained by the federal government. See *Union Oil*, 549 F.2d at 1273 (noting that although steam had been used to generate electricity in Italy as early as 1904, no geothermal power plants went into production in the United States until 1960). However, the question is not what Congress intended to reserve, but

rather what Congress intended to give away in its grant to the landholder in the SRHA. The established rule is that land grants are construed favorably to the government and nothing passes except that which is conveyed in clear language, resolving all doubts in favor of the government. *Western Nuclear*, 462 U.S. at 59.

As noted by the courts in *Western Nuclear* and *Union Oil*, the purpose of the SRHA was to open up lands suitable for development for ranching and the planting of forage crops, with the understanding that the farmer-stockman who would be a tenant would be unlikely to want to develop the underlying resources. *Western Nuclear*, 462 U.S. at 53-56; *Union Oil*, 549 F.2d at 1276-79. The question, then, is whether the farmer-stockman contemplated by Congress to be a patent holder would want to develop geothermal resources.

Rosette contends that geothermal resources are, in their essence, hot water, and that the water is useful in the farming and ranching context. In *Union Oil*, the appellees argued that references in the Congressional Record to homesteaders drilling wells indicated that Congress intended title to underground water to pass with the surface estate under the SRHA. The court rejected the argument, stating that references in the Congressional Record were not speaking to the commercial development of geothermal wells, but rather the development of fresh water for use by livestock. 549 F.2d at 1279.

It is highly unlikely that Congress intended that homesteaders taking patent to the surface area develop geothermal resources. Certainly, it would be difficult for such homesteaders to utilize geothermal steam or even hot

water for use in the production of forage crops and the raising of livestock.

Rosette also argues that the Department of Interior's position prior to the passage of the Steam Act in 1970 was that geothermal steam, as simply water at a high temperature, was not subject to the mineral reservation of the SRHA. In support of this contention, Rosette cites a memo from the Department of Interior in 1965 which includes two opinions from its solicitor's office that the mineral reservation clause does not include geothermal energy because it is essentially heated water, and water has generally not been treated as a mineral in other acts. Rosette argues it therefore must be inferred that Congress did not intend to reserve geothermal energy.

This same issue was also raised, using the same sources of support, in *Union Oil*. *See* 549 F.2d at 1279-80. Although the Union Oil court recognized the holding in *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and other cases, that great deference should be given to the construction of a statute by the officers or agency charged with its administration, it determined that deference to the opinions in question was not warranted. *See* 549 F.2d at 1279-80. The court stated that the views of the Department of the Interior did not reflect a contemporaneous construction by administrators who participated in the drafting of the statute, nor had Congress approved the interpretation. The court noted that instead, Congress, in its discussion regarding the Steam Act, had expressly disapproved of the Department's opinion as the conclusive determination of the question. *Id.* at 1280 (citing H.R.Rep. No. 91-1544, 91st Cong., 2d Sess., *reprinted* at 1970 U.S.Code Cong. & Admin. News 5113, 5119). Ultimately, the court stated the main deficiency in the documents by the Department of

the Interior was there was no attempt to actually examine the intent of Congress, which was the sole question in interpreting the statute. *Id.* at 1280, n. 19.

While it is true that great deference is given to the interpretation of a statute by the agency charged with its administration, this respect is particularly due where the administrative practice is a contemporaneous construction of the statute, which is not the case here. *See Udall*, 380 U.S. at 16. The two Department of Interior opinions which form the basis for Rosette's assertion were written in 1965 and the SRHA was passed in 1916. Also, much as the opinions are predated by the SRHA, they themselves predate the opinion in *Western Nuclear* and the test established therein. Neither opinion purports to consider what Congress might have intended in passing the SRHA, instead noting that water is generally not treated as a mineral in land-use laws, and from that general treatment extrapolating that geothermal resources are not reserved under the SRHA. An analysis of the two Department of Interior opinions does not reveal any in-depth consideration of the type of factors used in *Western Nuclear*. In fact, one opinion expressly notes that water, particularly subterranean water, is normally classified as a mineral. Further, rather than being recognized by Congress, the view of the Department of Interior was expressly rejected as authoritative by the Congressional Committee on Interior and Insular Affairs in its deliberations regarding the Steam Act. *See* 1970 U.S.Code Cong. and Adm. News at 5119 (stating that "the opinion of the Department is not a conclusive determination of the legal question"). As a result, we agree with the court in *Union Oil* that the Department of Interior's pre-Steam Act interpretation is

entitled to little deference in interpreting the mineral reservation in the SRHA.

Based on the application of the *Western Nuclear* test, we conclude that geothermal resources in general are in fact "minerals" under the SRHA. The components of the process, including magma, rock, and water, are minerals in the general sense that they are inorganic. The product of the process, whether steam or hot water, may be extracted from the soil and is usable for commercial purposes. Further, there is no reason to suppose that Congress intended that the geothermal resources be included in the surfaceholder's patent given the stated purpose of the patent to promote the raising of livestock and forage crops. The next question is whether the geothermal resources in the case at hand are so unusual as to take them outside this definition.

Geothermal resources in Well 55-7 as minerals under the SRHA

Rosette argues even if geothermal resources in a general sense are "minerals" under the SRHA, the particular geothermal resources used by Rosette do not fall under this definition. Rosette argues that, in the Steam Act, Congress recognized that not all geothermal resources were reserved to the federal government under the SRHA, that the particular nature of the hot water used by Rosette takes it outside the definition of a mineral under the SRHA because it was essentially potable water that could be used for stockraising and the planting of forage crops, and further that the water is not hot enough for commercial use.

The Steam Act

Rosette first argues that, in the Steam Act of 1970, Congress recognized the reservation clause in the SRHA did not encompass all geothermal resources. According to Rosette, 30 U.S.C. § 1020(b) calls for an authoritative judicial determination each time the Department of the Interior believes a particular geothermal well is subject to the mineral reservation clause in the SRHA. 30 U.S.C. § 1020(b) provides:

> Geothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced except under geothermal leases made pursuant to this chapter. If the Secretary of the Interior finds that such development is imminent, or that production from a well heretofore drilled on such lands is imminent, he shall so report to the Attorney General, and the Attorney General is authorized and directed to institute an appropriate proceeding in the United States district court of the district in which such lands are located, to quiet the title of the United States in such resources, and if the court determines that the reservation of mineral to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this chapter: Provided, That upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources, the duties of the Secretary of the Interior to report and of the Attorney General to institute proceedings, as hereinbefore set forth, shall cease.

Contrary to the assertion of Rosette, the legislative history of this part of the Steam Act does not reflect Congress' recognition that some geothermal resources are not included in the SRHA, but rather reflects Congress' recognition that, at the time the Steam Act was passed, it was an open question whether geothermal resources were included in the SRHA. See 1970 U.S.Code Cong. and Adm. News at 5119. The Committee on Interior and Insular Affairs stated that § 1020(b) was designed to provide for an authoritative judicial determination of whether geothermal resources were reserved under the mineral reservation in the SRHA. The Committee stated:

> The Committee is aware that the Department of the Interior has expressed the view that geothermal steam is not subject to the mineral reservation of the Stockraising Homestead Act of December 29, [1916]. The Committee is also aware that a contrary view has been expressed. As the opinion of the Department is not a conclusive determination of the legal question, it was the sense of the Committee that an early judicial determination of this question (upon which the Committee takes no position) is necessary. At issue is the ownership of geothermal steam on more than 35 million acres of land, the surface of which has passed from Federal ownership but with a reservation of minerals to the United States. The bulk of this acreage was patented under the provisions of the Stockraising Homestead Act, and the reserved minerals therein are subject to disposition under appropriate mineral laws. *It is not the intent of the Committee that this direction to initiate a proceeding in a U.S. District Court shall constitute a continuing obligation upon the Attorney General but merely that*

> *an authoritative judicial determination be obtained that the mineral reservation of the Stock-raising Homestead Act, and similar acts, does or does not reserve to the United States the geothermal steam.* The development of geothermal resources in these lands will be retarded until the question of ownership is determined.

1970 U.S.Code Cong. and Adm. News at 5119 (emphasis added). Thus, contrary to Rosette's assertion, § 1020(b) does not call for a judicial determination each time the federal government believes a well might be reserved, but rather calls for "an early judicial determination" on the question of whether geothermal rights are or are not included in the mineral reservation of the SRHA and other acts. It is not support for the contention that Congress recognized some geothermal wells may not fit within the reservation clause. Instead, it is support for the opposite proposition.

Nature of geothermal resources

Rosette argues the geothermal resources in question in this case are not salt water and geothermal steam, as was the case in *Union Oil*, but rather potable heated water containing less that 1,400 milligrams per liter of solids. According to the stipulated facts, beneficial use of the groundwater in Section 7 has been made for irrigation of field crops, stock watering, and various domestic uses, including drinking water. Rosette contends this is strong evidence that the geothermal rights should remain with it as the surfaceholder, as the water would be useful for the stockraising and forage crop producing activities contemplated in the SRHA. However, the geothermal resources in question in this case are from Well 55-7, which was an

exploratory well drilled deeper than 1,000 feet. The temperature of the water from the well was at 232.9 degrees Fahrenheit. The well was drilled in the 1980s and was never used as a source for irrigation. It is unlikely Congress, in passing the SRHA, contemplated that the surfaceholder would have the inclination and the expertise to develop geothermal resources at that temperature for the purpose of irrigation of forage crops and watering of stock. Although Rosette argues it could use the water for irrigation, its roses are irrigated from wells in an adjacent section.

There simply is no reason to suppose that Congress intended a geothermal well such as the one at issue be included within its grant of land to homesteaders under the SRHA. Given the characteristics of the well, Rosette's argument that the geothermal resources are included within its surfaceholder rights is not persuasive.

Temperature of geothermal resources

Rosette's next argument is that the temperature of the well is not sufficient to feasibly produce electrical energy. Rosette argues the temperature of the water renders it useless under the Steam Act, and further prevents it from being removable from the soil for purposes of the definition of a mineral under the SRHA. Both parties acknowledge the question of whether the temperature in Well 55-7 is hot enough for commercial generation of electricity is a disputed question of fact, which, if material, would require a remand. The district court found that the question was not material, and we agree.

For a substance to constitute a "mineral" under the mineral reservation of the SRHA, the substance must be

removable from the soil and usable for commercial purposes. *Western Nuclear*, 462 U.S. at 53. Rosette's contention that the resources at issue are not removable or usable is based on its reading of *Occidental Geothermal, Inc. v. Binkley Ranch Club*, 543 F.Supp. 870 (N.D. Ca. 1982). In *Occidental*, the court faced the question of whether the holder of mineral rights under the Steam Act could place an electrical power plant on the surface of land patented under the SRHA. In concluding the mineral rights holder could do so, the court addressed the nature of geothermal energy, stating:

> The starting point of the analysis is the undisputed fact that geothermal energy must be exploited, if it is to be exploited at all, on the lands from which it is to be removed. It is the geothermal steam heat and pressure that are used to produce energy. Of course, when steam is allowed to escape or is transported long distances, it loses its heat and pressure. If the steam cannot be used at the source, but rather must be conducted through pipes to distant electrical generating facilities, thereby exposing it to friction and heat loss, it loses its practical utility as a source of electrical energy . . . For this reason, the 'removal' of geothermal resources is inextricably connected to their 'utilization.' Indeed because these resources cannot be 'removed' without first being 'utilized' (to the extent of being converted into electrical energy), the two processes can, in the case of geothermal energy, be said to be one.

Id. at 874-75. The court in *Occidental* noted, however, that the owner of the mineral rights could not rely on the removal and utilization language to construct a chemical

plant or greenhouse powered by the geothermal resource without obtaining the consent of the surface owner.

Rosette seeks to enlarge the language in *Occidental* beyond its context. Rosette argues that, 1) since removal and utilization are one process in connection with geothermal resources, then 2) geothermal resources must be converted to electricity in order to be utilized and removed; and if 3) the geothermal resources cannot be feasibly converted into electricity, then 4) they cannot be removed, and 5) therefore they are not minerals under the SRHA.

It is true that, in most cases, in order to be utilized for the production of electricity, the geothermal resource must be removed and utilized on-site. This does not mean, conversely, that the geothermal resource must be used in the production of electricity in order to be removed and utilized. Even if the temperature of the geothermal resources in question does not allow them feasibly to be converted into electricity, this does not prevent them from being removed from the soil and utilized for commercial purposes. They may, for example, be removed by the mineral holder and sold to the surfaceholder for the heating of greenhouses or other surface structures on the property. The mineral rights may also be leased by the federal government directly to the surfaceholder for such purposes. In either case, the minerals are being removed from the soil and used for commercial purposes. Nor is the production of electricity the only purpose for which the geothermal resources can be used under the Steam Act. Although the Steam Act is generally geared toward the production of energy, it also encompasses other commercial uses for geothermal power, including the production of commercially important mineral by-products and the

development of new fresh water supplies. See 1970 U.S.Code Cong. & Adm. News at 5113.

Whether or not the temperature of the geothermal resources in Well 55-7 is high enough to allow it to be used to generate electricity is immaterial to its status as a mineral under the SRHA.

Entitlement to use of geothermal resources notwithstanding reservation clause

Rosette's final argument is that, even if the geothermal resources under Section 7 are minerals under the SRHA, Rosette still has the right to use the resources as surfaceholder to advance the purposes of the homestead. Rosette contends it has a permit to utilize the water rights in the section to develop the homestead, and that use could not be infringed by the federal government.

It is undisputed that Rosette has the right to beneficial use of 450 acre feet of water per annum issued by the New Mexico State Engineers Office. It is further undisputed that these rights predate the passage of the Steam Act. However, the rights do not predate the SRHA, and therefore, Rosette's rights to the use of the water are governed by its rights under its patents and the reservation of mineral rights by the federal government.

Rosette argues it is utilizing the geothermal resources in question to further its crop-raising activities, and that it has a right to do so in connection with its homestead. Rosette's argument that it may still use the geothermal resources in Well 55-7 in furtherance of its homestead is based on a footnote in *Western Nuclear. See* 462 U.S. at 54, n. 14, where the Court stated:

> We note that this case does not raise the question whether the owner of the surface estate may use a reserved mineral to the extent necessary to carry out ranching and farming activities successfully. Although a literal reading of the SRHA would suggest that any use of a reserved mineral is a trespass against the United States, one of the overriding purposes of the Act was to permit settlers to establish and maintain successful homesteads. There is force to the argument that this purpose would be defeated if the owner of the surface estate were unable to use reserved minerals even where such use was essential for stockraising and raising crops.

The Court drew an analogy between such a situation and that in *Shiver v. United States*, 159 U.S. 491 (1895), which concerned the right of a person under a homestead act to cut timber on federal lands. The Court held that, notwithstanding the fact that it was a crime to cut timber on lands held by the United States, the homesteading statute would be ineffective if the homesteader did not have the right to build a house, outbuildings, and fences, and to clear the land for cultivation. Although the Court in *Western Nuclear* found the rights of the homesteader to use reserved resources to be an interesting issue, it did not address it because the landowner in that case was selling gravel for commercial purposes not in any way related to farming or ranching.

Even if *Western Nuclear* can be read to establish such a right to use reserved minerals in connection with the homestead, this right would not encompass Rosette's activity. The purpose of the SRHA was to encourage settlement of the land for use in stockraising and the raising of forage crops. See *Western Nuclear*, 462 U.S. at

53, 103 S.Ct. 2218. Webster's Third New International Dictionary defines forage as "vegetable food (as hay, grain) for domestic animals." *Webster's Third New International Dictionary* 886 (1993). Other definitions are similar. See, e.g. 40 C.F.R. Pt. 158, App. A (1999) (listing forage crops as typical annual and perennial grasses, corn, sorghum, small grains for forage and perennial legumes). These definitions would not encompass the commercial raising of roses.

Any right that can be inferred from the footnote in *Western Nuclear* and the opinion in Shiver would extend only to the use of resources essential for stockraising and the raising of crops. See *Western Nuclear*, 462 U.S. at 54, n. 14. Thus, while Rosette might be able to use the heated water from geothermal resources under its property for use in watering livestock or irrigating forage crops and remain within the patent, the commercial activity of heating greenhouses to produce roses for sale falls outside the patent. Therefore, Rosette, by virtue of being the surfaceholder, does not acquire the right to use the geothermal resources in Well 55-7 for use in providing heat for its commercial greenhouse operation. The right to the resources remains in the federal government.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ROSETTE, INC., et al.,

Plaintiffs.

v. No. CIV 93-1379 BB/JHG

UNITED STATES
OF AMERICA, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant/Counter-Plaintiff's Motion for Summary Judgment (Doc. 125) on its Second Amended Counterclaim (Doc. 122), filed February 12, 1999. This is an action by the United States against Plaintiffs to enjoin Plaintiffs from utilizing or attempting to utilize in any manner certain geothermal resources within the lands covered by a BLM geothermal lease.

Facts

Plaintiff Rosette, Inc., (hereinafter "Rosette" or Plaintiffs) owns the surface estate to certain real property in Section 7, Township 25 South, Range 19 West, Hidalgo County, New Mexico ("Section 7"). Plaintiffs trace their title to patents from the United States, issued under the Stock-Raising Homestead Act ("SRHA") enacted December 29, 1916. 43 U.S.C. §§ 299, 301 (1994); Law of Mar. 4, 1923, ch. 245, § 2, 42 Stat. 1445 (repealed 1976); Law of

Dec. 29, 1916, ch. 9, §§ 1-8, 10, 39 Stat. 862-64, 65 (repealed 1976). Under these patents, the primary Defendant, the United States of America (hereinafter "the Government" or Defendant), reserved "all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine, and remove same pursuant to the provisions and limitations of the Act of December 29, 1916."

Several wells were drilled in the eastern half of Section 7 in the late 1940s and early 1950s. Water as hot as 240 Fahrenheit was encountered during this drilling. In 1970, Congress enacted the Geothermal Steam Act, 30 U.S.C. §§ 1001-1028 (1994). This Act granted the Secretary of the Interior authority to lease geothermal resources owned or reserved by the United States.

Plaintiffs are a collection of related corporations controlled by Dale Burgett or members of his immediate family. In 1977, Burgett Investment, Inc., entered into a geothermal lease agreement with Thermal Power Associates, Inc. ("Thermal"). At that time, Thermal was the surface owner of certain land in the eastern half of Section 7. Dale Burgett constructed his first greenhouse on Section 7 in 1978. Also in 1978, the Government offered the geothermal resources under Section 7 pursuant to a Geothermal Resource Lease. Dale Burgett bid on the lease, but Amax Exploration, Inc. ("Amax"), was selected as the successful bidder. Dale Burgett then met with Government employees to discuss the manner of calculating royalties for his use of the geothermal energy under the Amax lease.

In December of 1978, Burgett Investment, Inc., entered into an agreement with Amax to use the geothermal resources under Section 7 for commercial greenhouse

purposes. Under the agreement, Burgett Investment, Inc., was designated as an operator under the Amax lease. Burgett agreed to make royalty payments in the amount and manner required by the Government under the lease, and specifically agreed to be ". . . bound in the conduct of its operations by the terms and conditions of the federal lease to be issued AMAX . . . . " The lease was issued to Amax in 1979 and Burgett Investment, Inc., was formally designated as an operator under the lease. The Amax lease has been subsequently assigned but Burgett Investment, Inc., has remained the primary operator. Plaintiffs presently have nine commercial greenhouses on Section 7. The geothermal wells used by Plaintiffs to heat the greenhouses are all located in the eastern half of Section 7. The irrigation wells used by Plaintiffs are separate and located outside Section 7.

In 1993, Rosette filed suit against the United States claiming that geothermal resources are not reserved minerals under the SRHA, and, therefore, that the United States lacks the authority to regulate them. The complaint was styled as one for quiet title, ejectment, declaratory judgment, and permanent injunction. In 1996, this Court dismissed Plaintiffs' claims on statute of limitations grounds. (Mem. Op. and Ord. dated Oct. 10, 1996.) Plaintiffs appealed, and the Tenth Circuit affirmed. *Rosette, Inc. v. United States*, 141 F.3d 1394 (10th Cir. 1998). The Government's current motion requires this Court to now consider ownership of the geothermal resources.

Standard For Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When applying this standard, the Court "examine[s] the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F. 2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U. S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The non-moving party may not avoid summary judgment by resting upon the mere allegations or denials of their pleadings. *Id.* The Court will consider the motion for summary judgment in light of these standards.

Discussion

In December 1998, Defendant filed the Second Amended Counterclaim for preliminary and permanent injunction and damages. Defendant sets forth the basis of the dispute in the following terms:

> 7. By willfully attempting to use the geothermal resources deeper than 1000 feet without authority from the United States and the lessee, Plaintiffs have committed or are now committing a trespass upon the property of the United States.
>
> 8. Plaintiffs should be liable to the United States for any damages are [sic] incurred due to the trespass, including the cost of recapping and plugging the well.

(Doc. 122). In a Cross Motion for Summary Judgment, Rosette offers as an affirmative defense that by virtue of Rosette's patents giving Plaintiffs ownership of the surface lands described in their complaint, Rosette owns and has title to the disputed resources. (Doc. 124).

Beneath the land owned by Plaintiffs are sources of geothermal steam that travel through wells to heat Plaintiffs' greenhouses. The surface lands were patented under the SRHA. All patents issued under the Act are "subject to and contain a reservation to the United States of all the coal *and other minerals* in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." 43 U.S.C. § 299 (emphasis added). Section 299 further provides that "[t]he coal and mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." *Id.* The patents issued on the lands in Section 7 contain a reservation conforming to the words of the statute.[1] The issue at the heart of this case is whether the right to use geothermal as a heat source for the greenhouses passed to Plaintiffs or was retained by the United States under this reservation, i.e., is geothermal reserved as an "other mineral." This Court finds that pursuant to the SRHA, the geothermal resources located under the patented land are retained by the United States.

The language of the SRHA contains no specific reference to geothermal resources. This is hardly surprising as

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[1] The patents contain the following reservation: " . . . all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine and remove same pursuant to provisions and limitations of the Act of December 29, 1916."

this Act was passed by Congress in 1916. Since that time, vast technological advances have made it possible to locate and develop resources, like geothermal, that were inconceivable in 1916. However, the question is not whether given what modern science has uncovered about the nature of geothermal steam it makes sense to regard it as part of the surface water, but how Congress would have viewed the issue in 1916. *See Amoco Prod. Co. v. Southern Ute Indian Tribe*, 119 S. Ct. 1719, 1724 (1999). This determination turns on whether Congress intended the statute to be read broadly, thus incorporating geothermal as a mineral in the Act, or narrowly, excluding geothermal as a mineral because it is not specifically reserved by name in the statute. In *Amoco*, the Supreme Court used the SRHA as an illustration of a broad mineral reservation. The issue in *Amoco* was whether in applying the Coal Lands Act of 1909 and 1910, the "coal" reserved by the Government included the methane gas trapped within the coal beds. Writing for the Court, Justice Kennedy contrasted the narrow reservation of "coal in those statutes with the broad reservation of "all the coal and other minerals"" in the SRHA saying:

> The limited nature of the 1909 and 1910 Act reservations is confirmed by subsequent congressional enactments. When Congress wanted to reserve gas rights that might yield valuable fuel, it did so in explicit terms. In 1912, for example, Congress enacted a statute that reserved "oil and gas" in Utah lands. Act of Aug. 24, 1912, 37 Stat. 496. In addition, both the 1912 Act and a later Act passed in 1914 continued the tradition begun in the 1909 and 1910 Acts of reserving only those minerals enumerated in the statute. *See ibid.*; Act of July 17, 1914, 38 Stat. 509, as amended, 30 U.S.C. §§ 121-123 (providing that "lands

> withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals, or which are valuable for those deposits" could be patented, subject to a reservation to the United States of "the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable"). It was not until 1916 that Congress passed a public lands act containing a general reservation of valuable minerals in the lands. See Stock-Raising Homestead Act, ch. 9, 39 Stat. 862, as amended, 43 U.S.C. § 299 (reserving "all the coal and other minerals in the lands" in all lands patented under the Act). (Citation omitted.)

119 S. Ct. at 1726.

In 1986, the Supreme Court specifically addressed the reach of the SRHA in response to a question of whether gravel found on patented lands under the Act is a reserved mineral. *Watt v. Western Nuclear, Inc.*, 462 U. S. 36 (1983). Deciding that the scope of the mineral reservation was broad enough to include gravel, the Supreme Court considered the goal of the SRHA:

> In resolving the ambiguity in the language of the SRHA, we decline to construe that language so as to produce a result at odds with the purposes underlying the statute. Instead, we interpret the language of the statute in a way that will further Congress' overriding objective of facilitating the *concurrent development of surface and subsurface resources*.

Id. at 56 (emphasis added). Plaintiffs, then, must overcome what the Supreme Court has already recognized as a basic objective of the SRHA; separation of the surface and

the subsurface resources. This objective opened the surface for immediate agricultural use while preserving whatever mineral potential lay buried in the subsurface for later development.[2]

In 1977, the Ninth Circuit Court of Appeals also interpreted the SRHA reservation broadly in a case virtually identical to that at bar. *United States v. Union Oil Co. of Cal.*, 549 F.2d 1271 (9th Cir.) *cert. denied*, 434 U. S. 930, 98 S. Ct. 418 (1977). In *Union Oil*, the United States brought a quite title action under the Geothermal Steam Act of 1970 to determine whether the mineral reservation in patents issued under the SRHA reserved to the United States geothermal resources underlying the patented lands. *Id.* The Ninth Circuit engaged in a thoughtful and thorough analysis of the SRHA's background, language, and legislative history to determine whether the words of the mineral reservation in the Act encompass geothermal

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[2] There is also substantial Tenth Circuit authority interpreting similar statutory mineral reservations in favor of reserving the mineral estate in the United States. *See Exxon Corp. v. Lujan*, 970 F.2d 757 (10th Cir. 1992) (carbon dioxide deposits included in reservation of "gas" in the Agricultural Entry Act of 1914, 30 U.S.C. §§ 121-125.); *Aulston v. United States*, 915 F.2d 584 (10th Cir. 1990) (same); *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967) (oil shale included in reservation of "oil" in the Agricultural Entry Act of 1914, 30 U.S.C. §§ 121-125); *see also Spurlock v. Santa Fe Pacific R. Co.*, 694 P.2d 299 (App. 1984) (reservation of "all minerals whatsoever" retains ownership of all commercially valuable substances separate from the soil). Interpreting the SRHA to recognize Government retention of minerals beyond coal is also consistent with earlier Tenth Circuit precedent holding the grantor reserves ownership of minerals unknown at the time of the conveyance. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir.), *cert. denied*, 404 U. S. 951 (1971); *cf. New Mexico & Arizona Land Company v. Elkins*, 137 F.Supp. 767 (D.N.M.), *app. dismissed*, 239 F.2d 645 (10th Cir. 1956) (immaterial whether the parties knew of the existence of mineral at the time of the reservation).

resources. *Id.* The Ninth Circuit observed that there was, of course, no specific reference to geothermal steam and associated resources in the language of the SRHA or in its legislative history, since Congress was not aware of geothermal power at the time of enactment in 1916. *Id.* at 1273. The Court determined that the mineral reservation clause of the Act was to be read broadly to include geothermal in light of Congress' "dual purpose" in enacting the SRHA. *Id.* at 1274. This "dual purpose" includes on the one hand the agricultural purpose of the grant itself, and on the other, Congress' intent to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. *Id.*; *see also*, H. Rep. No. 103-44, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 92, 93 (describing the "split-estate" arrangement between surface and subsurface resources).

The Ninth Circuit's interpretation of the SRHA in *Union Oil* is further supported by 1993 congressional amendments to that Act. SRHA Amendments, Pub. L. 103-23, § 1(a) (1993) (current version at 43 U.S.C. § 299(p) (Supp.1998)). The purpose of the amendments was to "ensure that surface owners of lands patented under that Act have a say in the conduct of mining activities which may occur on their property." H. Rep. No. 103-44, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 92. Congress also specifically enumerated that the amended provisions designed to protect the rights of surface owners only apply to minerals not subject to disposition under the Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-1025 (Supp. 1998). 43 U.S.C. § 299(p). This would appear to be at least implicit recognition that the mineral reservation in the SRHA includes geothermal resources.

Adhering to the basic principles outlined in *Amoco* and *Watt*, this Court will adopt the Ninth Circuit's analysis of the SRHA in *Union Oil* and conclude that "[t]he purposes of the Act will be served by including geothermal resources in the statute's reservation of 'all the coal and other minerals.' Since the words employed are broad enough to encompass this result, the Act should be so interpreted." 549 F.2d at 1279.

Plaintiffs make several arguments in an attempt to avoid the above result. They contend the hot water from Well 55-7 is part of its surface estate conveyed under its SRHA patents. Plaintiffs further argue their title is superior to any title claimed by the United States as a result of its mineral reservation in those patents, and therefore the United States' claim of trespass is without merit. (Doc. 127 at 1.) Additionally, Plaintiffs assert they have a prior vested state property right in the water, as well as a valid existing right to utilize the hot water under the Federal Land Policy Management Act, 43 U.S.C. § 1701 *et seq.* (*Id.* at 2.) Finally, Plaintiffs contend their existing water rights cannot be subsequently impaired by application of the Geothermal Steam Act.

As an initial matter, Plaintiffs' current position that they, and not the United States, own the geothermal resources under the patent reservation must be considered in light of the fact that it is completely contrary to the arguments they presented in previous litigation before this Court.[3] Nevertheless, the Court will address the arguments

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[3] In 1986, Thermal sued the United States, Plaintiff Burgett Investment, Inc., and others in this Court. *Thermal v. United States*, No. CIV 86-1474 HB. The action sought to determine rights between the surface owner of a portion of Section 7, Thermal, the United States

(Continued on following page)

Plaintiffs now present in their Cross Motion for Summary Judgment.

Plaintiffs accept that the SRHA has a statutory mineral reservation for subsurface resources, but argue that what Rosette is using to heat the greenhouses is simply "hot water" and is not a reserved "mineral" under the Act. This "hot water," the argument goes, is put to proper use on agricultural products pursuant to the SRHA.[4] This argument is based on two principles of

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as mineral owner, and Burgett Investment, Inc., as operator under the Amax geothermal lease issued by the Government. Plaintiff Burgett Investment, Inc., filed a motion to dismiss in that action. Therein, Burgett Investment, Inc., asserted that it was the successor in interest to the United States pursuant to its reservation of rights under the SRHA, 43 U.S.C. § 291 *et seq.* On July 19, 1988, Dale Burgett filed an affidavit in support of Burgett Investment's motion to dismiss for lack of jurisdiction or for summary judgment. In that affidavit, he asserted Thermal Power Associates, Inc., had no right to charge for geothermal rights it did not own. In the memorandum in support of that motion, Burgett Investment, Inc., argued:

> Through the reservation of rights from the U.S., Burgett has the right to enter and occupy so much of the service as may be required for all purposes reasonably incident to the mining and removal of the mineral interests. Thermal Power has no right to extract the geothermal mineral from the property which was reserved by the United States. Burgett does have this right, under the Stock Raising Homestead Act 43 U.S.C. [sic] section 291 *et seq.*

[4] Under the SRHA, the Secretary of Interior was authorized to designate as stock-raising lands "the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops . . . . " 43 U.S.C. § 292 (repealed by Act of Oct. 21, 1976, Pub.L. No. 94-579, 90 Stat. 2787). Plaintiffs' product can hardly be described as a forage crop. *See, e.g.*, 40 C.F.R. Pt. 158, App. A. (1999) (forage crop includes: annual and perennial grasses, corn and sorghum, small grains for forage, perennial legumes); 7 C.F.R. § 1439.3 (1999) (seed small grain forage crops means wheat, barley, oats, rye, and triticale).

physics from which, Plaintiffs argue, conclusions logically derive. The first premise is that a geothermal resource is nothing more than hot water which is used to generate electricity. Without its use or potential use generating electricity, hot water ceases to be a geothermal product and thus legally follows other water rights. Plaintiffs explain:

> Heat, theoretically, can be removed from soil. However, in this instance, it is being removed from water. The water itself is clearly part of Rosettes [sic] surface estate.
>
> Heat can be used for commercial purposes. However in this instance, it is also utilized for agricultural purposes, consistent with the purposes of the SRHA. And critical in this instance, the heat is not severed from the surface estate and sold as an independent energy form, such as electricity.

(Doc. 128 at 8.)

The Court believes Plaintiffs' argument fails as it misapplies the Geothermal Steam Act of 1970 and is based on an erroneous conception of the nature of a geothermal resource. Despite Plaintiffs' contention, it is clear that the Geothermal Steam Act is not limited to only geothermal products that generate electricity. *See R & R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1075 (Utah 1997) (experts recognize geothermal energy cannot be equated with electrical power output but is rather itself energy that comes from the heat of the earth). Moreover, while it is apparent from the legislative history of the Geothermal Steam Act that Congress was primarily concerned with use of geothermal resources to generate electricity, *See* H.R. Rep. No. 91-1544, (1970), *reprinted in*

1970 U.S.C.C.A.N. 5113 et seq,[5] there is no evidence that Congress intended to limit the broad language of that statute.[6] The relevant portion of the Act reads:

> (c) "geothermal steam and associated geothermal resources" means (i) all products of geothermal processes, *embracing indigenous steam, hot water* and hot brines; (ii) steam and other gases, hot water and hot brines resulting from water, gas or other fluids artificially introduced into geothermal formations; (iii) *heat or other associated energy found in geothermal formations*; and (iv) any byproduct derived from them.

30 U.S.C. § 1001 (emphasis added).

Plaintiffs offer no clearly expressed legislative intention contrary to the clear language of § 1001(c). *Consumer Prod. Safety Comm'n*, 447 U. S. at 108. Plaintiffs do, however, cite certain Department of the Interior Opinions endorsing their position that geothermal steam is nothing more than water at a very high temperature, and thereby not subject to the mineral reservation of the SRHA. (Doc. 127 at 9). In a House Report, Congress specifically addressed the Department's position stating,

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[5] The relevant portion of House Report No. 91-1544 states, "[g]eothermal power is, literally, earth-heat-energy. The development of geothermal steam and associated geothermal resources involves the harnessing of the natural heat energy of the earth for the generation of electric power . . . . " 1970 U.S.C.C.A.N. at 5113-14.

[6] A "familiar canon of statutory construction is that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980); *see also Owen v. Magaw*, 122 F.3d 1350, 1354 n.1 (10th Cir. 1997).

> The committee is aware that the Department of the Interior has expressed the view that geothermal steam is not subject to the mineral reservation of the [SRHA]. The committee is also aware that a contrary view has been expressed. As the opinion of the Department is not a conclusive determination of the legal question, it was the sense of the committee that an early judicial determination of this question (upon which the committee takes no position) is necessary.

1970 U.S.C.C.A.N. at 5119; *see also Union Oil*, 549 F.2d at 1279 (discussion of same administrative interpretation).[7] In any event, the Ninth Circuit has now made the judicial determination sought by the Committee and it is not in Plaintiffs' favor.

Plaintiffs take their argument a step further arguing that the water they utilized is not even hot enough for commercially practicable generation of electricity. Whether this is a disputed issue between the parties is irrelevant to the Court's discussion, because, as was just stated, the ability of water to generate electricity is not a requirement for application of the Geothermal Steam Act. Although Plaintiffs cite to statutes from other states that include a

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[7] As additional support that Plaintiffs' hot water was not intended to be reserved to the United States under the SRHA, Plaintiffs cite *Occidental Geothermal, Inc. v. Simmons*, 543 F. Supp. 870 (1982). Plaintiffs' citation of this case seems somewhat incongruous as it contains several holdings supporting Defendant's position. *See Id.* at 876. Nonetheless, the Court believes Plaintiffs reliance is misplaced. *Occidental* discusses whether the Geothermal Steam Act authorized the right to build and operate power plants on the surface of the property which was subject to reservation of a geothermal resource. The case at bar involves the separate question of whether the United States reserved the geothermal resource.

energy generating requirement, it is clear that New Mexico does not have such a requirement for geothermal resources. *See* NMSA 1978, § 19-13-2 (1994) ("geothermal resources means the natural heat of the earth, or the energy, in whatever form, below the surface of the earth present in, resulting from or created by, or which may be extracted from, this natural heat").

Plaintiffs' second premise is but a variation on the first. They contend that their existing water rights attach to the surface property and reach down to the subsurface resource, thus preempting the Geothermal Steam Act. A characteristic of geothermal resources, setting them apart from other mineral resources, is that a major component is water in either liquid or gaseous form. See Ruth Musgrave Silver and Stephen P. Comeau, Comment, *Geothermal Energy: Problems and Shortcomings of Classification of a Unique Resource – A Look at Problems With Water Law, With Particular Emphasis on New Mexico,* 19 Nat. Res. L.J. 445 (1979). Plaintiffs reason that because the major component of geothermal resource is water, that geothermal water is included in their various vested water rights.

The problem with this argument is that it fails to make the distinction between using underground water to irrigate roses and using the heat contained in the water to warm a greenhouse. Plaintiffs continue to ignore the fact that more than just water is involved in producing the geothermal product. Geothermal energy is defined as the production of the earth's heat energy by magma or molten rock that intrudes into the earth's crust. The water contained in the porous rock is then heated to extreme temperatures and as it rises to the surface, produces steam. *See* Ethel R. Alston, Annotation, *Construction and Application of Geothermal Steam Act of 1970 (30 U.S.C.A.*

§§ 1001 et seq.) Pertaining to Leases of Government Lands for Development of Geothermal Steam Resources, 40 A.L.R. Fed 814 § 2[a] (1978). The question therefore is not merely a determination of water rights, but includes the issue of whether the SRHA reserves this geothermal heating process as a "mineral." The geothermal resource at issue in this case is used to heat greenhouses not irrigate roses. There is a clear use of the resource in the form of "hot water" and/or "heat or other associated energy found in geothermal formations." Simply put, even Plaintiffs' use of the "hot water" clearly conforms more closely to use as an energy source than it does as a source of water for agriculture.

In *Union Oil*, the Ninth Circuit specifically addressed whether the ownership of water rights should be deemed to include geothermal resources, concluding:

> [A] patentee under the Stock-Raising Homestead Act receives title to all rights in the land not reserved. It does mean, however, that the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are depletable subsurface reservoirs of energy, akin to deposits of coal and oil, which it was the particular objective of the reservation clause to retain in public ownership.

529 F.2d at 1279.

It is not dispositive that the Plaintiffs' predecessors in interest put the leased water to beneficial use for ranching purposes. Despite Plaintiffs' arguments, such use does not perfect a claim to the entire subsurface mineral estate. The difference between the energy in the geothermal resource and the water by which the energy is conveyed, was recognized by the Colorado Supreme Court in *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982) (en banc). The Colorado Court found the United States was entitled to a state water right in unappropriated water in connection with hot springs withdrawn pursuant to the Pickett Act, 43 U.S.C. § 141. However, that Court held such a water right did not give the federal government the right to make use of the water in the hot springs for geothermal power production under the Geothermal Steam Act, 30 U.S.C. § 1001 *et seq.*, saying, "[w]e conclude that the Geothermal Steam Act of 1970 provides for the leasing of federal lands for geothermal energy production. We do not find that any reservation of water was implied by Congress or is necessary to accomplish the purposes of the Act." *Id.* at 34.

The Court also disagrees with Plaintiffs' position that the use of the geothermal resource falls within their estate recognized under the Homestead Act. (Doc. 127 at 19). Plaintiffs rely on a footnote in *Watt*, which raises the question whether the owner of the surface estate may use a reserved mineral to the extent necessary to carry out ranching and farming activities successfully. 462 U. S. at 54 n. 14. In that footnote, the Supreme Court reasons by analogy to *Shiver v. United States*, 159 U.S. 491 (1895), in which the Court recognized that an entryman under the homestead laws had the right to cut timber necessary to establish a homestead, notwithstanding a federal statute

making it a crime to cut timber on the lands of the United States. This Court finds no analogy to *Shiver*. The present case involves the surface estate owners' desired use of reserved resources to operate large scale commercial greenhouses for growing roses. Unlike *Shiver*, then, the present case does not involve an incidental use of a minor portion of the reserved resource to advance the homestead purpose.[8] Rather, Plaintiffs have admitted the only reason they would "homestead" on this particular parcel is because of its access to the reserved geothermal resource.

Rosette also argues that BLM Geothermal Lease No. NM 34790 grants the right to use potable water wells free of cost. However, it is the Court's understanding that the issue that gives rise to this action is Rosette's improper use of Well 55-7 below 1,000 feet. (Doc. 122 at 2). Plaintiffs admit that their agreement with Amax gave them no right to drill a well deeper than 1,000 feet without prior written consent. In addition, Plaintiffs admit that their decision to drill below 1,000 feet was made without permission from either the lessee or the United States. (Doc. 124 at 2). Plaintiffs cannot now assert a right under the lease to remove resources in a way that violates the very lease from which their alleged right derives. Finally, the lease provision permitting the lessee to use wells for potable water for lease related purposes cannot fairly be read to include free use of the heat from geothermal wells. Once again, the distinction between potable water and the heat it transports is critical.

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[8] *See also Amoco Prod. Co.*, 119 S. Ct. at 1727 ("The right to dissipate the CBM [coal bed methane] gas where reasonable and necessary to mine the coal does not, however, imply ownership of the gas in the first instance.").

Conclusion

Legal precedent from the Tenth Circuit, as well as the Supreme Court, supports a broad interpretation of the mineral reservation contained in the SRHA. To read it narrowly would not only do violence to the *Watt* principles of the construction of mineral reservations, it would also contravene the well reasoned and thoughtful opinion in *Union Oil*. Further, it would bestow a windfall on Burgett who understood from the beginning his geothermal rights derived from the federal lease. This is exactly the result Congress was trying to avoid in creating the mineral reservation in the SRHA. Therefore, the language of the statutory mineral reservation to the Government in the SRHA is found to include geothermal steam and associate geothermal resources. The mineral reservations placed on Plaintiffs' land grants under the SRHA are therefore effective to reserve to the United States geothermal resource as an "other mineral in the lands so entered and patented" by Plaintiffs.

ORDER

For the reasons stated above, this Court finds that title to the geothermal resource in question is vested in the United States as a matter of law under the patent reservation in the deed issued to Rosette's predecessor in interest under the Stock-Raising Homestead Act of December 19, 1916.

IT IS HEREBY ORDERED that the Defendant's Motion for Summary Judgment (Doc. 125) be, and hereby is, GRANTED.

FURTHER, IT IS ORDERED that Plaintiffs' Cross Motion for Summary Judgment (Doc. 127) is DENIED.

FURTHER THE COURT ORDERS:

1. A preliminary and permanent injunction prohibiting Plaintiffs from utilizing or attempting to utilize in any manner geothermal resources located deeper than 1,000 feet within the lands covered by BLM Geothermal Lease No. NM 34790 without authorization from the United States and the lessee under the Lease; and

2. A preliminary and permanent injunction ordering Plaintiffs to remove the pump from and to recap Well 55-7, but prohibiting Plaintiffs from further disturbing Well 55-7.

The damages portion of the claim was not sufficiently presented to the Court for consideration, so the Court will reserve judgment on that issue pending further pleadings by the parties.

Dated at Albuquerque this 15th day of September, 1999.

/s/ Bruce D. Black
BRUCE D. BLACK
United States
District Judge

Counsel for Plaintiffs:
Stephen E. Hosford, Steven L. Hernandez, Hubert & Hernandez, Las Cruces, NM

Counsel for Defendants:
John W. Zavitz, Assistant U.S. Attorney, Albuquerque, NM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALBUQUERQUE,
NEW MEXICO

ROSETTE, INC., et al.,

Plaintiffs,

vs.

UNITED STATES
OF AMERICA, et al.,

Defendants.

No. CIV 93-1379 BB/JHG

JUDGMENT

(Filed Sep. 20, 2000)

THIS MATTER, came before the Court by way of trial on the merits without a jury in Las Cruces, New Mexico on November 16 and 17, 1998, on the issues of propriety of the BLM mandated metering system and as to the amount of alleged past due royalties and the method of calculating those royalties. The remaining issues of title and trespass came before the Court upon the Defendant/Counterplaintiff, United States' Motion for Summary Judgment (document 125) on its Second Amended Counterclaim, (document 122), and upon the Plaintiff/Counterdefendant's cross Motion for Summary Judgment (document 127). The Court issued its Findings of Fact and Conclusions of Law December 18, 1998 regarding the trial on the merits. The Court issued its Memorandum Opinion and Order on September 15, 1999 regarding the issue of title to the geothermal resource, reserving for additional evidence in that Memorandum Opinion and Order, the issue of damages for trespass to

be assessed against Plaintiff/Counterdefendant Rosette, Inc. The parties have reached a stipulation as to the appropriate damages as a result of the Court's Memorandum Opinion and Order of September 15, 1999, and have incorporated said stipulation into this Judgment.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follow:

1. The issue of the amount of past due royalties is hereby remanded to MMS for determination of the appropriate amount of royalties owing to Defendants based on BTU consumption calculated by the accepted degree day method, and based on the appropriate least expensive, reasonable alternative fuel which is geothermal hot water produced in southern New Mexico. This Court retains jurisdiction over this matter to the extent of any dispute arising between the parties as to the method of calculating royalties and the amount of past due royalties, after the MMS revised determination pursuant to this remand.

2. Title to the geothermal resource in question is hereby determined to be vested in the United States under the reservation in the patent issued to Rosette's predecessor in interest under the Stock Raising Homestead Act of December 19, 1916.

3. Plaintiff Rosette is hereby permanently enjoined from utilizing or attempting to utilize in any manner geothermal resources located deeper than 1,000 feet within lands covered by BLM geothermal lease no. NM34790 without authorization from the United States and the lessee under the lease.

4. Plaintiff Rosette is hereby permanently enjoined to remove the pump from and to recap well 55-7, and

should be further enjoined from further disturbing well 55-7 without authorization from the United States.

5. On or before September 19, 2000 Rosette shall provide BLM with a current map of all existing wells on lease NM 34790 and with any well data it possesses for those wells.

6. By October 31, 2000 Rosette shall provide BLM with sundry notices for the plugging and abandonment for the access wells not proposed to be used under Rosette's operating plan (approximately 17 wells).

7. By October 31, 2000 Rosette shall provide BLM with a current operating plan for the five metered production wells currently covered by lease NM 34790. The current $30,000 bond posted by Rosette will be acceptable as adequate for those five wells.

8. By October 31, 2000 BLM will provide Rosette with a revised metering system specification to cover the metering system as presently installed and BLM will withdraw its prior specifications regarding those meters. Plaintiff Rosette will operate and maintain the revised metering system and provide data to BLM.

9. By October 31, 2000 Rosette shall post a cash bond with the District Court in the amount of $9,723.44 covering past metering system maintenance expenses. BLM agrees to treat this as a supersedeas bond to be released upon the termination of any appeal herein.

10. Rosette agrees to plug and abandon well 55-7 in accordance with specifications previously provided to Rosette by BLM, at such time as BLM may direct.

11. BLM hereby waives any claim for any additional damages or affirmative relief as to well 55-7, other than the directives to Plaintiff contained within this order, with respect to the trespass found by the Court herein, and Plaintiff Rosette's compliance with this order regarding well 55-7 shall be considered a satisfaction of this judgment as to damages for Plaintiff's trespass to well 55-7.

While the Court has retained jurisdiction over this matter to hear any dispute between the parties concerning this MMS redetermination of the appropriate amount of past due royalties and the reasonableness of the method of calculating those past due royalties, the Court hereby determines that there is no just reason for delay and expressly directs that entry of this judgment shall be a Final Order with respect to the title issue submitted to the Court upon the parties' respective motions for summary judgment on Defendant's Second Amended Counterclaim, (documents 122, 125, 127) decided in the Court's September 15, 1999 Memorandum Opinion and Order.

/s/ Bruce D. Black
THE HONORABLE
BRUCE D. BLACK
UNITED STATES
DISTRICT JUDGE

PREPARED AND SUBMITTED BY:

MARTIN, LUTZ, ROGGOW, HOSFORD
& EUBANKS, P.C.

By /s/ Stephen. E. Hosford
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APPROVED AS TO FORM BY:

/s/ John W. Zavitz
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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROSETTE INCORPORATED, a New Mexico corporation; BURGETT INVESTMENT, INCORPORATED, a New Mexico corporation; BURGETT GEOTHERMAL GREENHOUSE, INCORPORATED, a New Mexico corporation,

Plaintiffs-Counter-Defendants-Appellants,

v.

UNITED STATES OF AMERICA; JOHN ASHCROFT, as Attorney General; DEPARTMENT OF INTERIOR; GALE A. NORTON, Secretary of Interior of the United States; JAMES BACA, in his official capacity as Director of Bureau of Land Management; WILLIAM CALKINS, in his official capacity as State Director of Bureau of Land Management; LINDA RUNDELL, in her official capacity as Las Cruces District Manager of Bureau of Land Management,

Defendants-Counter-Claimants-Appellees.

No. 00-2453

ORDER

Filed March 28, 2002

Before **BRISCOE** and **MURPHY,** Circuit Judges, and **OBERDORFER**[*] Senior District Judge.

Appellants' petition for rehearing is denied.

The Petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Karen Phillips
Deputy Clerk

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[*] The Honorable Louis F. Oberdorfer, Senior United States District Judge, District of Columbia, sitting by designation.

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30 U.S.C. § 1020

§ 1020. Publication in Federal Register of known geothermal resource area lands; necessity of geothermal leases for development or production of geothermal resources in lands which the United States transferred with reservation of mineral rights

(a) Within one hundred and twenty days after December 24, 1970, the Secretary shall cause to be published in the Federal Register a determination of all lands which were included within any known geothermal resources area on December 24, 1970. He shall likewise publish in the Federal Register from time to time his determination of other known geothermal resources areas specifying in each case the date the lands were included in such area; and

(b) Geothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced except under geothermal leases made pursuant to this chapter. If the Secretary of the Interior finds that such development is imminent, or that production from a well heretofore drilled on such lands is imminent, he shall so report to the Attorney General, and the Attorney General is authorized and directed to institute an appropriate proceeding in the United States district court of the district in which such lands are located, to quiet the title of the United States in such resources, and if the court determines that the reservation of minerals to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this chapter:

Provided, That upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources the duties of the Secretary of the Interior to report and of the Attorney General to instutute proceedings, as hereinbefore set forth, shall cease.

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43 U.S.C. § 299

§ 299. Reservation of coal and mineral rights

(a) General provisions

All entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral

deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this subchapter with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this subchapter.

(b) Exploration; location of mining claims; notices

(1) In general

(A) Notwithstanding subsection (a) of this section and any other provision of law to the contrary, after the effective date of this subsection no person other than the surface owner may enter lands subject to this subchapter to explore for, or to locate, a mining claim on such lands without –

(i) filing a notice of intention to locate a mining claim pursuant to paragraph (2); and

(ii) providing notice to the surface owner pursuant to paragraph (3).

(B) Any person who has complied with the requirements referred to in subparagraph (A) may, during the authorized exploration period, in order to locate a mining claim, enter lands subject to this subchapter to undertake mineral activities related to exploration that cause no more than a minimal disturbance of surface resources and do not involve the use of mechanized earthmoving equipment, explosives, the construction of roads, drill pads, or the use of toxic or hazardous materials.

(C) The authorized exploration period referred to in subparagraph (B) shall begin 30 days after notice is provided under paragraph (3) with respect to lands subject to such notice and shall end with the expiration of the 90-day period referred to in paragraph (2)(A) or any extension provided under paragraph (2).

(2) Notice of intention to locate a mining claim

Any person seeking to locate a mining claim on lands subject to this subchapter in order to engage in the mineral activities relating to exploration referred to under paragraph (1)(B) shall file with the Secretary

of the Interior a notice of intention to locate a claim on the lands concerned. The notice shall be in such form as the Secretary shall prescribe. The notice shall contain the name and mailing address of the person filing the notice and a legal description of the lands to which the notice applies. The legal description shall be based on the public land survey or on such other description as is sufficient to permit the Secretary to record the notice on the land status records of the Secretary. Whenever any person has filed a notice under this paragraph with respect to any lands, during the 90-day period following the date of such filing, or any extension thereof pursuant to this paragraph, no other person (including the surface owner) may –

(A) file such a notice with respect to any portions of such lands;

(B) explore for minerals or locate a mining claim on any portion of such lands; or

(C) file an application to acquire any interest in any portion of such lands pursuant to section 1719 of this title.

If, within such 90-day period, the person who filed a notice under this paragraph files a plan of operations with the Secretary pursuant to subsection (f) of this section, such 90-day period shall be extended until the approval or disapproval of the plan by the Secretary pursuant to subsection (f) of this section.

(3) Notice to surface owner

Any person who has filed a notice of intention to locate a mining claim under paragraph (2) for any lands subject to this subchapter shall provide written notice of such filing, by registered or certified mail with return receipt, to the surface owner (as evidenced by local tax records) of the lands covered by the notice under paragraph (2). The notice shall be

provided at least 30 days before entering such lands and shall contain each of the following:

(A) A brief description of the proposed mineral activities.

(B) A map and legal description of the lands to be subject to mineral exploration.

(C) The name, address and phone number of the person managing such activities.

(D) A statement of the dates on which such activities will take place.

(4) Acreage limitations

The total acreage covered at any time by notices of intention to locate a mining claim under paragraph (2) filed by any person and by affiliates of such person may not exceed 6,400 acres of lands subject to this subchapter in any one State and 1,280 acres of such lands for a single surface owner. For purposes of this paragraph, the term 'affiliate' means, with respect to any person, any other person which controls, is controlled by, or is under common control with, such person.

(c) Consent

Notwithstanding subsection (a) of this section and any other provision of law, after the effective date of this subsection no person may engage in the conduct of mineral activities (other than those relating to exploration referred to in subsection (b)(1)(B) of this section) on a mining claim located on lands subject to this subchapter without the written consent of the surface owner thereof unless the Secretary has authorized the conduct of such activities under subsection (d) of this section.

(d) Authorized mineral activities

The Secretary shall authorize a person to conduct mineral activities (other than those relating to exploration referred to in subsection (b)(1)(B) of this section) on lands subject to this subchapter without the consent of the surface owner thereof if such person complies with the requirements of subsections (e) and (f) of this section.

(e) Bond

(1) Before the Secretary may authorize any person to conduct mineral activities the Secretary shall require such person to post a bond or other financial guarantee in an amount to insure the completion of reclamation pursuant to this subchapter. Such bond or other financial guarantee shall ensure –

(A) payment to the surface owner, after the completion of such mineral activities and reclamation, compensation for any permanent damages to crops and tangible improvements of the surface owner that resulted from mineral activities; and

(B) payment to the surface owner of compensation for any permanent loss of income of the surface owner due to loss or impairment of grazing, or other uses of the land by the surface owner to the extent that reclamation required by the plan of operations would not permit such uses to continue at the level existing prior to the commencement of mineral activities.

(2) In determining the bond amount to cover permanent loss of income under paragraph (1)(B), the Secretary shall consider, where appropriate, the potential loss of value due to the estimated permanent reduction in utilization of the land.

(f) Plan or operations[1]

(1) Before the Secretary may authorize any person to conduct mineral activities on lands subject to this subchapter, the Secretary shall require such person to submit a plan of operations. Such plan shall include procedures for –

(A) the minimization of damages to crops and tangible improvements of the surface owner;

(B) the minimization of disruption to grazing or other uses of the land by the surface owner; and

(C) payment of a fee for the use of surface during mineral activities equivalent to the loss of income to the ranch operation as established pursuant to subsection (g) of this section.

(2) The Secretary shall provide a copy of the proposed plan of operations to the surface owner at least 45 days prior to the date the Secretary makes a determination as to whether such plan complies with the requirements of this subsection. During such 45-day period the surface owner may submit comments and recommend modifications to the proposed plan of operations to the Secretary.

(3) (A) The Secretary shall, within 60 days of receipt of the plan, approve the plan of operations if it complies with the requirements of this subchapter, including each of the following:

(i) The proposed plan of operations is complete and accurate.

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[1] So in original. Probably should be "Plan of operations".

(ii) The person submitting the proposed plan of operations has demonstrated that all other applicable Federal and State requirements have been met.

(B) The Secretary shall notify the person submitting a plan of operations of any modifications to such plan required to bring it into compliance with the requirements of this subchapter. If the person submitting the plan agrees to modify such plan in a manner acceptable to the Secretary, the Secretary shall approve the plan as modified. In the event no agreement can be reached on the modifications to the plan which, in the opinion of the Secretary, will bring such plan into compliance with the requirements of this subchapter, then the Secretary shall disapprove the plan and notify both the surface owner and the person submitting the plan of the decision.

(C) The 60-day period referred to in subparagraph (A) may be extended by the Secretary where additional time is required to comply with other applicable requirements of law.

(D) The Secretary shall suspend or revoke a plan of operation whenever the Secretary determines, on the Secretary's own motion or on a motion made by the surface owner, that the person conducting mineral activities is in substantial noncompliance with the terms and conditions of an approved plan of operations and has failed to remedy a violation after notice from the Secretary within the time required by the Secretary.

(4) Final approval of a plan of operations under this subsection shall be conditioned upon compliance with subsections (e) and (g) of this section.

(g) Fee

The fee referred to in subsection (f)(1) of this section shall be –

(1) paid to the surface owner by the person submitting the plan of operations;

(2) paid in advance of any mineral activities or at such other time or times as may be agreed to by the surface owner and the person conducting such activities; and

(3) established by the Secretary taking into account the acreage involved and the degree of potential disruption to existing surface uses during mineral activities (including the loss of income to the surface owner and such surface owner's operations due to the loss or impairment of existing surface uses for the duration of the mineral activities), except that such fee shall not exceed the fair market value for the surface of the land.

(h) Reclamation

Lands affected by mineral activities under a plan of operations approved pursuant to subsection (f)(3) of this section shall be reclaimed, to the maximum extent practicable, to a condition capable of supporting the uses to which such lands were capable of supporting prior to surface disturbance. Reclamation shall proceed as contemporaneously as practicable with the conduct of mineral activities.

(i) State law

(1) Nothing in this subchapter shall be construed as affecting any reclamation, bonding, inspection, enforcement, air or water quality standard or requirement of any

State law or regulation which may be applicable to mineral activities on lands subject to this subchapter to the extent that such law or regulation is not inconsistent with this title.

(2) Nothing in this subchapter shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, the interest of such person in water resources affected by mineral activities.

(j) Inspections

Should any surface owner of land subject to this subchapter have reason to believe that they are or may be adversely affected by mineral activities due to any violation of the terms and conditions of a plan of operations approved under subsection (f) of this section, such surface owner may request an inspection of such lands. The Secretary shall determine within 10 days of the receipt of the request whether the request states a reason to believe that a violation exists, except in the event the surface owner alleges and provides reason to believe that an imminent danger exists, the 10-day period shall be waived and the inspection conducted immediately. When an inspection is conducted under this paragraph, the Secretary shall notify the surface owner and such surface owner shall be allowed to accompany the inspector on the inspection.

(k) Damages for failure to comply

(1) Whenever the surface owner of any land subject to this subchapter has suffered any permanent damages to crops or tangible improvements of the surface owner, or any permanent loss of income due to loss or impairment of

grazing, or other uses of the land by the surface owner, if such damages or loss result from –

(A) any mineral activity undertaken without the consent of the surface owner under subsection (c) of this section or an authorization by the Secretary under subsection (d) of this section; or

(B) the failure of the person conducting mineral activities to remedy to the satisfaction of the Secretary any substantial noncompliance with the terms and conditions of a plan under subsection (f) of this section;

the surface owner may bring an action in the appropriate United States district court for, and the court may award, double damages plus costs for willful misconduct or gross negligence.

(2) The surface owner of any land subject to this subchapter may also bring an action in the appropriate United States district court for double damages plus costs for willful misconduct or gross negligence against any person undertaking any mineral activities on lands subject to this subchapter in violation of any requirement of subsection (b) of this section.

(3) Any double damages plus costs awarded by the court under this subsection shall be reduced by the amount of any compensation which the surface owner has received (or is eligible to receive) pursuant to the bond or financial guarantee required under subsection (e) of this section.

(*l*) Payment of financial guarantee

The surface owner of any land subject to this subchapter may petition the Secretary for payment of all or any

portion of a bond or other financial guarantee required under subsection (e) of this section as compensation for any permanent damages to crops and tangible improvements of the surface owner, or any permanent loss of income due to loss or impairment of grazing, or other uses of the land by the surface owner. Pursuant to such a petition, the Secretary may use such bond or other guarantee to provide compensation to the surface owner for such damages and to insure the required reclamation.

(m) Bond release

The Secretary shall release the bond or other financial guarantee required under subsection (e) of this section upon the successful completion of all requirements pursuant to a plan of operations approved under subsection (f) of this section.

(n) Conveyance to surface owner

The Secretary shall take such actions as may be necessary to simplify the procedures which must be complied with by surface owners of lands subject to this subchapter who apply to the Secretary to obtain title to interests in such lands owned by the United States.

(*o*) Definitions

For the purposes of subsections (b) through (n) of this section –

(1) The term "mineral activities" means any activity for, related to or incidental to mineral exploration, mining, and beneficiation activities for any locatable mineral on a mining claim. When used with respect to this term –

(A) the term "exploration" means those techniques employed to locate the presence of a locatable mineral deposit and to establish its nature, position, size, shape, grade and value;

(B) the term "mining" means the processes employed for the extraction of a locatable mineral from the earth; and

(C) the term "beneficiation" means the crushing and grinding of locatable mineral ore and such processes are employed to free the mineral from the other constituents, including but not necessarily limited to, physical and chemical separation techniques.

(2) The term "mining claim" means a claim located under the general mining laws of the United States (which generally comprise 30 U.S.C. chapters 2, 12A, and 16, and sections 161 and 162) subject to the terms and conditions of subsections (b) through (p) of this section.

(3) The term "tangible improvements" includes agricultural, residential and commercial improvements, including improvements made by residential subdividers.

(p) Minerals covered

Subsections (b) through (o) of this section apply only to minerals not subject to disposition under –

(1) the Mineral Leasing Act (30 U.S.C. 181 and following);

(2) the Geothermal Steam Act of 1970 (30 U.S.C. 100[2] et seq.); or

(3) the Act of July 31, 1947, commonly known as the Materials Act of 1947 (30 U.S.C. 601 and following).

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[2] So in original. Probably should read "30 U.S.C. 1001".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ROSETTE INC., et al.,

Plaintiffs,

vs. No. CIV 93-1379 HB

UNITED STATES OF AMERICA, et al.,

Defendants.

STIPULATED FACTS

(Filed Mar. 10, 1995)

The parties having conferred by and through their counsel, hereby submit their list of stipulated facts.

SURFACE ESTATE AND MINERALS ESTATE

1. Plaintiff Rosette, Inc. owns the surface estate to certain real property in Section 7 Township 25 South Range 19 West, Hildago County, New Mexico, by virtue of Untied States patents nos.1077955 issued August 27, 1935 and patent no. 1059123 issued February 2, 1933. Plaintiff's patents, with all appurtenances, were issued under the Stock Raising Homestead Act of December 29, 1916. Defendant Untied States has reserved unto itself in said patents, "all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine, and remove same pursuant to provisions and limitations of the Act of December 29, 1916, (39 Stat. 862)". Copies of the patents are attached hereto as Exhibit 1A-1B and Exhibit 1C.

2. Defendant United States purports to lease the alleged geothermal resource in question in this action to

Lightning Dock Geothermal, Inc., under a certain resource, Lease NM 34790. The original Lessee was Amax, Inc. The Lease was subsequently assigned to Lighting Dock, Inc., which is the present Lessee. A copy of lease NM 34790 is attached hereto as Exhibit 2A-2E.

3. There are two designated operators under Lease NM 34790, Plaintiff *Burgett Investment, Inc.* is one designated operator under Lease NM 34790. Tom McCants, *who is not a party in this action,* is the other designated operator under the Lease. Mr. McCants also owns surface and water rights on lands within the designation of operator.

HISTORY OF WELLS ON S7 T25S R19W

4. On May 5, 1948 the New Mexico State Engineer declared the upper Animus valley, which includes Section 7, Township 25 South, Range 19 West, as the Animus Valley Underground Water Basin, and closed the area to further ground water appropriate after June 14, 1948.

5. Well completions logs and certain hydrological reports indicate that beginning in October of 1948 irrigation wells in Section 7, Township 25 South, Range 19 West were drilled under ground water right declarations submitted to the State Engineer's Office prior to June 14, 1948. One well drilled in 1948 in Section 7 encountered hot water. In a report by W. K. Summers published in 1976 entitled "Catalog of Thermal Waters in New Mexico: New Mexico Bureau of Mines and Minerals Resources Hydrologic Report 4", Summers indicates the temperature of the water from one well on S7 T25S R19W was 240 degrees Fahrenheit. Exhibits 3A-3D are pages 15 through 18 of Summers report.

6. By 1950 slightly more than half of the western side of Section 7 was under irrigation, and slightly less than half of the western side of Section 7 was still under irrigation in 1955.

7. A report prepared by H. O. Reeder in 1957 entitled "Ground Water in Animas Valley, Hildago County, New Mexico: New Mexico State Engineer Technical Report 11" shows four thermal wells in the Animas valley by 1957 in Section 7, Township 25 South, Range 19 West, as well as other areas in Section 7 under irrigation. The thermal wells are located on the eastern side of Section 7. These tables and maps from Reeders Report are attached hereto as Exhibit 4A-4C.

Reeder's table (Exhibit 4A) shows that two of the wells drilled in S7 T25S R19W in the late forties or early fifties were identified by State Engineer Office Permits A-64 and A-65. Use of water from these wells did occur prior to the passage of the Geothermal Steam Act.

SURFACE OWNER VESTED H2O RIGHT 450 ACRES

9. Plaintiff Burgett Investment, Inc., has permits to beneficial use of 450 acres feet of water per annum issued by the State Engineers Office beginning in 1978. These permits are under Applications No. A-36A, A-36B, A-64 and A-65. Water rights permitted under state law under permit A-36 were perfected prior to the passage of the Geothermal Steam Act in 1970, and also predate Lease NM 34790. These rights were transferred by Plaintiff Burgett in 1978 from their location in Section 4, T26S, R20W to Section 7 T25S R19W. Permits under A64 and

A65 relate to the original hot wells on the property described in Reeder's report.

10. State Engineer's Office Applications A-36A, A-36B, A-36-AB-S1 through S9, A-64, A-65, A-65A, A-65AS are all presently under permit to Burgett Investment, Inc. These permits provide that Burgett Investment, Inc., presently has valid beneficial use of ground water for "irrigation within greenhouses and related purposes". To date water from these wells have been used to heat greenhouses. These rights constitute a valid right of appropriation and beneficial use of water under State Engineer policy and regulations, established pursuant to New Mexico statutes, Chapter 72, and would permit Plaintiff to utilize water from these wells under state law.

NATURE OF THE "HOT" WATER AND ITS USES

11. Exhibit 5A-5H attached is a document within the BLM files on Lease NM 34790. It shows the existing well locations on Plaintiff Rosette's property, and provides a "history" of Plaintiff Rosette's well drilling and use. Rosette Inc. wells designated Nos. 1, 6 and 6A on Exhibit 5, are believed to be the original "hot wells" sampled by Reeder and described by him in his reports.

12. There are eighteen other wells located on the property on the surface owned by Plaintiff Rosette Inc. in Section 7 T25S R19W, all presently under permit with the State Engineer's Office pursuant to state law. None of the wells are permitted by the Bureau of Land Management (BLM), and Plaintiffs' have not sought permits from the BLM for drilling or use of any wells within Section 7. BLM issued a notice of non-compliance in 1982 but has not

taken any further action to require Plaintiff to permit these wells with BLM.

13. The wells in Section 7, 25 South, 19 West produce water ranging in temperature from 80 degrees Fahrenheit to 240 degrees Fahrenheit. Total dissolved solids of this water is generally less than 1400 milligrams per liter. Beginning in 1936 beneficial use of ground water in the western half of Section 7 has been made for irrigation of field crops, stock watering and various domestic uses, including used as drinking water. Of the five wells BLM requires Plaintiff Rosette to meter, and which are used to heat greenhouses, the lowest temperature is 190 degree fahrenheit, while the highest temperature is 235 degrees fahrenheit. This water is permitted for irrigation and livestock use if Plaintiff chooses to use the water for that purpose, but to date it has been used by Plaintiff only to heat greenhouses.

14. Plaintiff Rosette is in the business of growing roses in greenhouses for commercial distribution. The roses are planted into the ground. Plaintiff utilizes water from three of the wells located on Section 12, about a mile away from the greenhouses, for irrigation of the roses. Plaintiff utilizes the heat in the water from five wells located in the southeastern part of Section 7, to heat its greenhouses. This water is passed through pipes and other water use equipment and the heat radiates to heat the greenhouses. This water is then discharged, under a discharge permit issued by the Oil conservation Division of the State of New Mexico. All of the heat utilized from the water is used on Plaintiff's premises for growing roses by heating the greenhouses. No heat is sold by Plaintiff or is used to generate energy which is then sold by Plaintiff to

others. Plaintiff has acquired equipment by which electricity could be produced if the water is hot enough. It is contested whether the water is hot enough for production of electricity for economically feasible off-site sales. No heat is transported off of the Plaintiff's surface estate or is used to generate energy which is then transported or otherwise severed from Plaintiff Rosette's surface estate. The roses are produced for sale on and off premises.

EXTENT OF REGULATORY AUTHORITY

15. Defendant, Department of Interior through its Minerals Management Service, charges Plaintiff Burgett a royalty for heat in the water which is utilized by Plaintiff Rosette in its greenhouse operations to heat the greenhouse. Defendant, Department of Interior, by virtue of the Geothermal Steam Act, asserts no authority over the water in question, but only the heat in that water. All water has heat.

RELATIONSHIP AMONG PLAINTIFF'S

16. The relationship between Plaintiff Rosette, Inc., Plaintiff Burgett Investment, Inc. and Dale Burgett, an individual is as follows: Betty Beagles, Paula Thomas and Jerry Malone are the daughters of Dale Burgett. Betty Beagles, Paula Thomas and Jerry Malone are the owners of all or substantially all of the stock of Rosette, Inc., and Burgett Geothermal Greenhouse, Inc. Dale Burgett is substantially involved in the day-to-day operations of Burgett Geothermal Greenhouse, Inc. Dale Burgett was substantially involved in acquisition by Rosette, Inc., of the real property described in the complaint.

INTENT OF GEOTHERMAL STEAM ACT

17. House of Representatives Report No. 95-1544, 91st Congress, 2d Session, and (1970) and Senate Report No. 1160, 91st Congress, 2d Session (1970) which provide the legislative history in part behind the Geothermal Steam Act, are attached hereto as Exhibits 6A-6BB.

18. Other states have attempted to address issues relating to geothermal resources on state land. The parties stipulate that this Court may take judicial notice of such legislation, including statutes from the states of Montana, Code Ann. 77-4-101 through 77-4-2-11 (1993), Nevada, Rev. Stat. Chapter 534A (1994 Cum. Supp.), Oregon, Rev. Stat. Chapter 522 (1987) and Washington, Rev. Code Chapter 79.76 (1991).

PROCEDURAL REQUIREMENTS OF GEOTHERMAL STEAM ACT

19. No administrative or legal proceeding under 30 U.S.C. § 1020(b) has ever been brought by the United States to quiet title specifically to the alleged geothermal resources in question. The United States purports to have complied with 30 U.S.C. § 1020(b) requiring a quiet title action to construe the minerals reservation in Plaintiff's patent by virtue of *U.S. v. Union Oil,* 549 F.2d 1271 (9th Cir. 1977) cert. denied 434 U.S. 930 (1978), and by the alleged recognition of the United States title by Plaintiffs.

20. On December 10, 1986, an action was filed in the United States District Court, District of New Mexico, CIV 86-1474M styled *Thermal Power Associates, Inc., an Arizona corporation, Plaintiff versus Burgett Investment, Inc., a New Mexico corporation, Geothermal Properties,*

Inc., a New York corporations, Untied States of America, Edwin Meese, as Attorney General, Donald P. Hodel, as Secretary of the Interior, Defendants. The case was dismissed upon a joint motion on December 29, 1988. Exhibit 7, to be submitted by the parties in chambers with the Administrative Record on Lease 34790, (See paragraph 21 herein), are documents from the Thermal Power Associates case which Defendant United States relies upon on as the basis of its claims of collateral estoppel and res judicata. Exhibit 8 attached hereto, is a letter from Assistant U.S. Attorney, Ray Hamilton, to U.S. District Judge Bratton, which Plaintiff submits in addition to Exhibit 8, the pleadings submitted by Defendants.

ADMINISTRATIVE RECORD

21. Defendants will submit to chambers, a copy of the complete BLM files on Lease NM 34790. The documents have been numbered by the BLM 1 through 807 for reference herein. Either party may refer to documents within these files in their briefs tendered on the legal issues.

IDENTIFICATION OF CONTESTED FACTS

1. Whether the water being utilized by the Plaintiff is hot enough for practicable commercial generation of electricity.

/s/ John W. Zavitz
John W. Zavitz
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, NM 87103
(505) 766-3341

Attorney for Defendants
(Faxed signature
attached, original
to follow)

/s/ Stephen E. Hosford
Stephen E. Hosford
2100 N. Main,
Suite 1
P.O. Drawer 2857
Las Cruces, NM 88005
(505) 526-2100

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ROSETTE, INC., et al.,

Plaintiffs,

vs. No. CIV 93-1379 BB/JHG

UNITED STATES OF AMERICA, et al.,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON SECOND AMENDED COUNTERCLAIM

* * *

STATEMENT OF MATERIAL FACTS
AND HISTORICAL BACKGROUND

* * *

5. In December of 1978, Rosette entered into an agreement with Amax to use the geothermal resources in Section 7 to be leased by Amax from BLM for commercial greenhouse operation purposes. AR, pp. 43-46. Rosette admits that the agreement does not provide it with any right to " . . . drill deeper than 1000 feet without obtaining prior written consent. . . . " See Answer to Second Amended Counterclaim, ¶ 5.

6. Amax was subsequently issued a lease by BLM which, as consolidated, includes all relevant lands within Section 7. AR 54-58, AR 143-144, AR 152-154. This lease was subsequently assigned to Steam Reserve Corporation. AR 265-266. In 1984, Steam Reserve Corporation obtained approval from BLM and drilled Well 55-7

to a depth in excess of 1000 feet. AR 261-262. In 1985, Steam Reserve Corporation considered transfer of Well 55-7 to Rosette, but instead sought and obtained approval from BLM to plug and abandon Well 55-7. AR 313-315.

* * *

14. Rosette admits that it has recently reopened and installed a pump on Well 55-7 and intends to use the well. See Answer to Second Amended Counterclaim, ¶ 6. Rosette further admits that it has not been granted permission by either the lessee or the United States to open or utilize this well. See Answer to Second Amended Counterclaim. ¶ 6.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ROSETTE INC., et al.,

Plaintiffs,

vs. **No. CIV 93-1379 HB**

UNITED STATES OF AMERICA, et al.,

Defendants

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFFS CROSS MOTION FOR SUMMARY JUDGMENT ON SECOND AMENDED COUNTER-CLAIM, AND IN RESPONSE TO THE DEFENDANTS MOTION AND MEMORANDUM FOR SUMMARY JUDGMENT ON SECOND AMENDED COUNTER-CLAIM

* * *

ADDITIONAL STATMENT OF MATERIAL FACTS BY PLAINTIFF ROSETTE

* * *

24. Regarding Well 55-7, Plaintiff Rosette has applied to the State Engineers Office to appropriate and make beneficial use of water from said well as a supplemental well to its existing wells. A copy of the Application for Permit, Well Record, and Proof of Completion of Well is appended to the Affidavit of Dale Burgette, attached hereto.

* * *

4-1007

THE UNITED STATES OF AMERICA,

TO ALL WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a Certificate of the Register of the Land office at Las Cruces, New Mexico, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Ike DeVilbiss has been established and duly consummated, in conformity to law, for the Lots three, four, five, six and seven, the southeast quarter of the northwest quarter and the east half of the southwest quarter of Section six and the Lots one and two, the east half of the west half and the west half of the northeast quarter of Section seven in Township twenty-five south of Range nineteen west of the New Mexico Meridian, New Mexico, containing six hundred twenty-five acres and three hundredths of an acre, according to the Official Plat of the Survey of the said Land, on file in the GENERAL LAND OFFICE.

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described TO HAVE AND TO HOLD the said tract of land with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as

may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 129, 1916 (39 Stat., 862).

IN TESTIMONY WHEREOF, I, Herbert Hoover, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twentieth day of October in the year of our Lord one thousand nine hundred and thirty-two and of the Independence of the United States the one hundred and fifty-seventh.

By the President: Herbert Hoover

By Leafie E. Dietz, Secretary

Emma L. Warren
Recorder of the General
Land Office

Las Cruces 036439

THE UNITED STATES OF AMERICA

To all in whom these presents shall come, Greetings

WHEREAS, a Certificate of the Register of the Land Offices of Las Cruces, New Mexico, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain" and the acts supplemental thereto, the claim of Dora Kerr has been established and duly consummated, in conformity to law, for the southeast quarter of Section twelve and the northeast quarter of the northeast quarter of Section thirteen in Township twenty-five south of Range twenty west and the Lots three and four, the southeast quarter, and the southeast quarter of the northeast quarter of Section seven and the Lot one, the northeast quarter of the northwest quarter, and the north half of the northeast quarter of Section eighteen in Township twenty-five south of Range nineteen west of the New Mexico Meridian, New Mexico, containing six hundred thirty-five acres and ninety-three hundredths of an acre, according to the Official Plat of the Survey of the said Land, on file in the GENERAL LAND OFFICE.

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant, and to the heirs and assigns of the said claimant forever subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized

and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 19, 1916 (39 Stat., 862).

IN TESTIMONY WHEREOF, I, Franklin D. Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twenty-seventh day of August in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

By the President: Franklin D. Roosevelt

By Louise Polk Wilson, Secretary

R. S. Clinton
Recorder of the General
Land Office